(24,520)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 776.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. T. CRAFT, ADMINISTRATOR OF THE ESTATE OF TOM CRAFT, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

INDEX.

	Original.	Print
Transcript of record from the third judicial circuit court in and for Jackson county	1	1
Caption	1	1
Complaint	2	1
Answer filed	6	3
Answer withdrawn	7	3
Motion to require plaintiff to state under what law suit is filed	9	4
Order overruling motion, etc.	10	5
Answer filed	11	5
Answer and endorsements	12	5
Amendment to answer filed	16	7
Amendment to answer	17	8
Amendment to complaint filed	19	9
Amendment to complaint	20	9
Demurrer and answer filed	27	13
Order overruling demurrer	27	13
Demurrer	28	13
Answer	28	13

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 27, 1915.

	Original.	Print
Verdict	36	17
Judgment	36	17
Motion for new trial filed	38	18
Order overruling motion for a new trial, etc.	39	18
Bill of exceptions	41	19
Testimony of A. J. Speer	42	19
N. B. Pyles	69	36
W. E. Hawkins	85	45
L. H. Tanner	98	52
J. T. Craft	112	61
Exhibit A—Letters of administration	133	74
Testimony of Cromwell West	134	75
Testimony of J. T. Craft (recalled)	137	77
Exhibit B—Certified copy of proceedings of court in the matter of the appointment of J. T. Craft as administrator, etc.	147	83
Testimony of Dr. M. P. McNeill	150	85
Cromwell West (recalled)	153	86
T. J. Hightower	158	89
L. H. Tanner (recalled)	160	91
Geo. M. Sisk	165	93
L. H. Tanner (recalled)	169	96
D. T. Wachter	175	99
H. Allen	183	103
W. B. Robinson	200	112
H. E. Silcox	205	115
Exhibit A—Blue print of Baringeross Yards	210	117
Testimony of A. J. Speer (recalled)	211	118
Testimony of H. E. Silcox (recalled)	215	120
Instructions requested by plaintiff	218	122
Instructions requested by defendant	221	124
Verdict	230	128
Motion for new trial	231	129
Certificate of judge to bill of exceptions	253	141
Fee bill	254	141
Certificate of circuit clerk	256	142
Minute entries	258	143
Order overruling motion to submit with case 3210	258	143
Motion to dismiss postponed for hearing on merits	258	143
Order of argument and submission	259	143
Judgment	259	143
Opinion, Hart, J.	261	144
Clerk's certificate	266	147
Petition for a writ of error	267	148
Order allowing writ of error and fixing bond	268	148
Bond on writ of error	269	148
Writ of error	271	151
Certificate of lodgment	273	152
Citation and service	274	153
Clerk's certificate and return to writ of error	275	154
Memorandum of costs	275	154

1 *Caption.*

Pleas Before Hon. R. E. Jeffery, Judge of the Third Judicial Circuit of the State of Arkansas, in which is included the County of Jackson, To wit:

In the Jackson Circuit Court.

J. T. CRAFT, Administrator of the Estate of Tom Craft, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Action for Damages.

On the Seventh day of February, 1914, the same being a regular day of the Spring Term, 1914, of said Jackson Circuit Court.

2 In the Jackson Circuit Court.

J. T. CRAFT, Administrator of the Estate of Tom Craft, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Complaint.

Comes J. T. Craft, Administrator of the Estate of Tom Craft, deceased, and suing here for the benefit of himself as father of said deceased, for cause of action, says:

That the said Tom Craft departed this life on the 16th day of February, 1913, intestate, in Pulaski County, Arkansas. That thereafter, on the — day of February, 1913, he (J. T. Craft) was duly appointed and qualified as Administrator of said Estate. That the St. Louis, Iron Mountain & Southern Railway Company is a railroad corporation organized and doing business under the laws of the State of Arkansas, and owns and operates a line of railroad in and through Jackson County, Arkansas.

That the deceased, Tom Craft, at all times hereinafter mentioned, was an employee of the said defendant railway company, as a brakeman. That in the City of Argenta, Arkansas, the defendant company maintains railroad yards, in which are located tracks number five and number six, running parallel, and about four feet between the rails.

3 That at, or about two o'clock a. m., on the 16th day February, 1913, the said deceased, Tom Craft, was walking between said tracks numbered five and six, in the performance

of his duties as such brakeman. That it was a dark night and there were no lights in that part of defendant company's yards, either natural or artificial. That at and prior to that time the defendant company, negligently, through its agents, servants and employees, permitted a lot of bolts, knuckles, pins and scrap iron and other material to be piled up between said tracks, thereby rendering the place unsafe; and the defendant knew, or by the exercise of ordinary care could have known of said unsafe condition.

That about said hour on said sate, defendant company, through its agents, servants and employees, negligently and with great force and speed, propelled a coal car on track number six in the direction of said deceased, without warning, and negligently failed to place signals on said car, or any persons thereon to give signals or warning of its approach. That at or about said hour and date, to-wit: about two o'clock a. m., on the 16th day of February, 1913, the deceased, Tom Craft, while in the performance of his duties as said brakeman, by reason of the negligence of the defendant company as aforesaid, was knocked or caused to fall beneath said coal car. thereby causing the wheels of said car to pass over and upon said deceased, Tom Craft, inflicting upon his body, many great and fatal injuries, which thereafter resulted in his death. That by reason of said injuries, said Tom Craft thereafter died.

4 That the said deceased was a young man twenty-three years of age and unmarried, and left surviving him, his father, J. T. Craft, who is fifty-three years of age, and who was dependent upon said deceased for support. That the said deceased was of good habits and sober and industrious, and at the time of his death was earning on an average of One Hundred Dollars per month. That he was in line of promotion and advancement and would, had not death preceded, within a short time, have been advanced and promoted and his salary increased to Two Hundred Dollars per month. That during the life time of said deceased, he contributed and set aside to the support of his father, J. T. Craft, from one-half to two-thirds of his income and rendered many great and valuable personal services to his father in that he nursed and cared for his father during sickness, administered to his wants and looked after his care and comforts. That the said father is in poor health and had said deceased lived, said father would have received, during the remainder of his life, from one-half to two-thirds of the income of said deceased, as well as the benefit of personal services rendered by said deceased in nursing, caring for and looking after the needs and comforts of his said father. That by reason of the negligence of the said defendant company as aforesaid, in causing the death of said Tom Craft, the father has been damaged in the sum of Twenty Thousand Dollars ($20,000.00).

Wherefore, premises considered, plaintiff prays for judgment against said defendant company for the benefit of J. T. Craft, father of said deceased, in the sum of Twenty Thousand

5 Dollars, for costs and all proper relief.

JACKSON & JONES,
JONES & CAMPBELL,
Attorneys for Plaintiff.

The following endorsements appear on the foregoing Complaint: No. 2791. J. T. Craft, Adm'r Est. of Tom Craft, Dec'd, vs. St. Louis, Iron Mountain & Southern Ry. Co. Complaint. Filed Aug. 28, 1913. Chas. E. Smith, Circuit Clerk. Box 4.

Summons on the foregoing Complaint issued in due form 8/28/13, and returned duly served 8/30/13.

6 In the Jackson Circuit Court, at the Fall Term thereof, to-wit: Wednesday, September 10th, 1913, the following proceedings were had and done, to-wit:

No. 2791.

J. T. CRAFT, Adm'r Est. Tom Craft, Deceased,
vs.
ST. L., I. M. & S. RY. CO.

Answer Filed.

On this day comes the defendant, by its attorneys, Campbell & Suits, and by leave of the Court files its answer herein.

7 In the Jackson Circuit Court, at the Fall Term thereof, to-wit: Monday, September 15", 1913, among others the following further proceedings were had and done, to-wit:

No. 2791.

J. T. CRAFT, Administrator of Estate of Tom Craft, Deceased,
Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Defendant.

Answer Withdrawn.

On this day came the defendant, by its attorneys, and *by* leave of the Court is hereby granted to said defendant to withdraw its answer now on file herein, and is further granted leave to plead further to the complaint herein.

8 In the Jackson Circuit Court, at the Fall Term thereof, to-wit: Tuesday, September the 16", 1913, among others the following proceedings were had and done, to-wit:

No. 2791.

J. T. CRAFT, Adm'r Est. Tom Craft, Dec'd,
vs.
ST. L., I. M. & S. RY. CO.

Motion to Require Pl't'f to State under What Law Suit Is Brought.

On this day comes the defendant, by its attorneys, and by leave of the Court files its motion requiring plaintiff to state under what law this suit is brought.

9 In the Jackson Circuit Court.

No. 2791.

J. T. CRAFT, Administrator of the Estate of Tom Craft, Deceased, Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Motion to Require Plaintiff to State under What Law He Is Proceeding.

Comes defendant and moves the Court to require the plaintiff to state of record and in his complaint upon what law he relies for a recovery herein and upon what law the complaint in this case is based; that is, whether upon some law of the State of Arkansas, or whether upon some law of the United States or Act of Congress.

Defendant says that it is necessary for it to have this information in order to enable it to properly answer herein; and in order to enable it to prepare for its defense.

S. D. CAMPBELL AND
FRED R. SUITS,
Attorneys for Defendant.

The following endorsements appear on the foregoing Motion to Require Plaintiff to state under what Law he is proceeding, to-wit: No. 2791. J. T. Craft, Admr. Estate of Tom Craft, Deceased, vs. St. L. I. M. & S. Ry. Co. Motion to Require Plaintiff to State under what Law he is proceeding. Filed Sept. 16, 1913. C. E. Smith, Clerk.

10 In the Jackson Circuit Court, at the Fall Term thereof, to-wit: Wednesday, September 17", 1913, among others the following further proceedings were had and done, to-wit:

No. 2791.

J. T. CRAFT, Adm'r of Tom Craft, Dec'd,
vs.
ST. L., I. M. & S. RY. CO.

Motion Overruled.

On this day comes the defendant by its attorneys, Campbell and Suits, and the plaintiff being present by his attorneys, the motion of the defendant requiring plaintiff to state under what law suit was brought herein heretofore filed herein, coming on to be heard, and the court being well and sufficiently advised as to the law arising thereon doth overrule the same.

It is therefore considered, ordered and adjudged by the Court that said defendant's motion be and the same is hereby overruled, to which judgment and ruling of the Court in overruling said defendant's motion, the defendant by its attorneys excepted and to save its said exceptions asked that same be noted of record and made a part thereof, which is accordingly done.

11 In the Jackson Circuit Court, at the Fall Term thereof, to-wit: Thursday, September the 18", 1913, among others the following further proceedings were had and done, to-wit:

No. 2791.

J. T. CRAFT, Adm'r of Tom Craft, Deceased,
vs.
ST. L., I. M. & S. RY. CO.

Answer Filed.

On this day comes the defendant, by its attorneys, Campbell & Suits, and by leave of the Court files its answer herein.

12 In the Jackson Circuit Court, Fall Term, 1913.

No. 2791.

J. T. CRAFT, Administrator of the Estate of Tom Craft, Deceased,
Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Defendant.

Answer.

Answering the complaint of plaintiff herein, defendant states that it has not sufficient knowledge or information upon which to found a belief as to whether or not plaintiff is the duly qualified

administrator of the estate of Tom Craft, deceased, and therefore denies such allegation. Defendant denies that at two o'clock a. m., or any hour, on Feb. 16, 1913, or any other date, said deceased, Tom Craft, was walking between defendant's tracks numbered five and six, or any other tracks in the performance of his duties as brakeman. Denies that it was a dark night; denies that there were no lights in that part of defendant's yards. Denies that at or prior to said alleged date, or at any time whatever, the defendant, either negligently or in any manner, through any of its agents, servants, employees, or otherwise, permitted any bolts, knuckles, pins, scrap iron or any other material to be piled up between said alleged tracks, denies that said place was thereby, or in any manner, rendered unsafe; denies that defendant knew of such alleged unsafe condition or could have, in any manner, or by any means, known of said alleged unsafe condition. Defendant denies that at said
13 hour or date, or at any time whatever, it negligently or in any manner, through any of its agents, servants, employees or otherwise, propelled any coal car, or any car, with any force or speed, or at all, on track numbered six, or any other track, in the direction of deceased, or in any direction whatever; denies that it did so without warning; denies that it negligently, or in any manner, failed to place signals on said alleged car; denies that it negligently or in any manner failed to place a person on said alleged car to give signals and warning, etc. Defendant denies that at said alleged hour and date, or at any time, said Tom Craft, while in the performance of his duties as brakeman or otherwise, by reason of any negligence of defendant or at all, was knocked or caused to fall beneath said alleged coal car; denies that any of the wheels of said alleged car were caused to pass over or upon said Tom Craft; denies that any great or fatal injuries were inflicted upon his body, or that he thereafter died therefrom.

Defendant denies that said J. T. Craft was dependent upon said deceased for support. Denies that at the time of the death of deceased, or at any time, he was earning on an average of One Hundred Dollars per month, or any like sum. Denies that deceased was in the line of promotion or advancement; denies that within a short time, or at all, deceased would have been advanced or promoted or his salary increased to Two Hundred Dollars per month, or any like sum. Defendant denies that during the life time of deceased he ever contributed or set aside to the support of his father any amount whatever from his income; denies that he rendered any per-
14 sonal services whatever to his father; denies that he nursed or cared for his father at any time; denies that he administered to any of his father's wants or looked after his father's care or comforts. Defendant denies that said father is in poor health; denies that if said deceased had lived said father would have received, during the remainder of the father's life or at any time, any amount whatever of the income of deceased; and denies that said father would have received at any time any benefit of personal services rendered by deceased by nursing, caring for or looking after the needs or comforts of the father, or in any other way. De-

fendant denies that it has been guilty of any negligence in said matter; denies that it caused the death of said Tom Craft; denies that by reason of any of the alleged facts, or at all, the plaintiff J. T. Craft, has been damaged in the sum of Twenty Thousand Dollars or any other sum whatever.

II.

For its second and separate defense hereto, defendant states that if it be true that plaintiff, J. T. Craft, has suffered any loss or damage as alleged (which defendant denies), said loss and damage was caused, produced and brought about by the negligent acts and conduct of said deceased, Tom Craft, himself, for which this defendant is in no way responsible; and defendant hereby pleads such negligent acts and conduct of the said deceased as a bar to any recovery herein.

15 III.

For its third and separate defense hereto, defendant states that if it be true that plaintiff, J. T. Craft, has suffered any loss or damage as alleged (which defendant denies), said loss and damage was the result and consequence of a risk and hazard which the said deceased, Tom Craft, voluntarily assumed and took upon himself, for the consequences this defendant is in no way responsible; and defendant hereby pleads such assumption of risk by said deceased as a complete bar to any recovery herein.

Wherefore having fully answered, defendant prays for judgment in its behalf herein, that it have its costs and all proper relief.

S. D. CAMPBELL,
F. R. SUITS,
Attorneys for Defendant.

Endorsed: No. 2791. J. T. Craft, Admr. Estate of Tom Craft, Dec'd, vs. St. L., I. M. & S. Ry. Co. Answer. Filed: September 18, 1913. C. E. Smith, Clerk.

16 In the Jackson Circuit Court at the Fall Term thereof, to-wit: Wednesday, September 24", 1913, among others the following further proceedings were had and done, to-wit:

No. 2791.

J. T. CRAFT, Adm'r Est. Tom Craft, Dec'd,
vs.
ST. L., I. M. & S. RY. CO.

Amendment to Answer Filed.

On this day comes the defendant, by its attorneys, Campbell & Suits, and by leave of the Court files an amendment to its answer heretofore filed herein.

17 In the Jackson Circuit Court, Fall Term, 1913.

No. 2791.

J. T. CRAFT, Administrator of the Estate of Tom Craft, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Amendment to Answer.

Comes defendant and by way of Amendment to its Answer already on file herein alleges and shows to the Court that it is engaged in commerce between a number of the different States of the Union; and in particular the States of Arkansas, Missouri and Illinois; and was so engaged at all times mentioned in the Complaint herein; that at the time of the alleged death of the said Tom Craft, and immediately prior to that time, he was employed by the defendant (it being a carrier of interstate commerce) in such interstate commerce between said States by being assigned to and acting as brakeman upon a through freight train which was carrying a cargo from Argenta, in the State of Arkansas, destined to points in the States of Missouri and Illinois and other States. And defendant further shows to the Court that the matters and things complained of and embraced within the complaint are governed solely and exclusively by an Act of Congress of the United States approved Apr. 22, 1908, commonly known and designated as the Federal Employers' Liability Act. And defendant further shows that said act and the laws of the United States, and they alone, are applicable to, govern
18 and control the alleged cause of Action herein.

Wherefore, having fully answered, defendant prays as before.

S. D. CAMPBELL,
FRED R. SUITS,
Attorneys for Defendant.

Endorsed: No. 2791. J. T. Craft, Admr., vs. St. L., I. M. & S. Ry. Co. Amendment to Answer. Filed Sep. 24, 1913. Chas. E. Smith, Clerk.

19 In the Jackson Circuit Court at the Winter Term thereof, to-wit: Monday, the 2nd day of February, 1914, among others the following further proceedings were had and done, to-wit:

No. 2791.

J. T. CRAFT, Adm'r,
vs.
ST. L., I. M. & S. RY. Co.

Amended Complaint Filed.

On this day comes the plaintiff, by his attorneys, and by leave of the Court files his amended complaint herein.

20 In the Jackson Circuit Court.

No. 2791.

J. T. CRAFT, Administrator of the Estate of Tom Craft, Deceased, Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Amended Complaint.

Comes J. T. Craft, Administrator of the Estate of Tom Craft, deceased, and suing here for the benefit of himself as father and next of kin to said deceased for cause of Action says:

That the said Tom Craft departed this life on the 16th day of February, 1913, intestate, in Pulaski County, Arkansas, leaving no heirs at law, and only this plaintiff, J. T. Craft, his father, surviving; that thereafter on the — day of February, 1913, the said J. T. Craft was duly appointed and qualified as Administrator of said Estate; that the St. Louis, Iron Mountain and Southern Railway Company, is a railroad corporation duly organized and doing business under the laws of the State of Arkansas, and owns and operates a line of railroad in Jackson County, Arkansas, and is engaged among other things, in a business of a common carrier of interstate commerce.

That the deceased, Tom Craft, at all times hereinafter mentioned, was an employee of the said Railroad Company, as a brakeman; that as such employee and at all times hereinafter complained of,
21 he was engaged in the business of Interstate Commerce and performing the duties required by the defendant engaged in such commerce; that in the City of Argenta, Arkansas, the defendant company maintains railroad yards in which are located tracks for switching purposes and which run parallel and a few feet distance between the rails.

That on or about 2 o'clock a. m. on the 16th day of February, 1913, the said deceased, Tom Craft, was walking between said tracks of defendant company in the city of Argenta and performing his duties as such brakeman; that it was a dark night and there were no lights in that part of defendant company's yards, either natural or artificial, that at and prior to that time, at the place where deceased

was walking, and where it was necessary for him to walk to perform his duties, the defendant company negligently, through its agents, servants and employees, permitted a lot of bolts, knuckles and pins, drawbars and scrap iron and other material to be piled up between said tracks, thereby rendering the place unsafe, and the defendant knew or by exercise of ordinary care could have known of said unsafe condition.

That about said hour on said date, defendant Company, through its agents, servants and employees, negligently and with great force and speed propelled a coal car with great force and speed on a track to the side of where deceased was walking, and negligently failed to place signals on said car or any person thereon to give signals of its approach, and negligently failed to keep a lookout upon said car for persons who might rightfully be or upon said track; that at
22 or about said hour and date, to-wit: about 2 o'clock on the 16th day of February, 1913, the said deceased, Tom Craft, while in the performance of his duties as brakeman, and while engaged in interstate commerce, by reason of the negligence of defendant company as aforesaid, was knocked or caused to fall beneath said coal car, thereby causing the wheels of said car to pass over, and upon said deceased, many great and fatal injuries, which thereafter resulted in his death.

That the said deceased was a young man of twenty-three years of age and unmarried, and left surviving him, his father, J. T. Craft, who is fifty-three years of age, and who is dependent upon said deceased for his support; that the said deceased was of good habits, sober and industrious, and at the time of his death was earning on an average of One Hundred Dollars per month; that he was in line of promotion, and advancement, and would, had not death preceded, within a short time, have been advanced and promoted and his salary increased to Two Hundred Dollars per month. That during the life of said deceased he contributed and set aside to the support of his father, from one-half to two-thirds of his income, and rendered many great and valuable personal services in that he nursed and cared for his father during his sickness, administered to his wants and looked after his care and comfort. That said father is in poor health and had said deceased lived, said father would have received, during the remainder of his life, from one-half to two-thirds of the income of said deceased, as well as the benefit of personal
23 services rendered by said deceased, in nursing, caring for and looking after the needs and comforts of the said father. Plaintiff says that by the injuries inflicted upon said deceased, suffered great physical pain, mental anguish and the agonies of death for a period of over three hours, by reason of all this plaintiff claims damages in the sum of $30,000.00.

Wherefore, premises considered, plaintiff prays judgment against said defendant Company for the benefit of J. T. Craft, father of said deceased and the next of kin in the sum of $30,000.00, cost and all proper relief.

II.

Plaintiff for further cause of action says: That the said Tom Craft departed this life on the 16th day of February, 1913, intestate, in Pulaski County, Arkansas; that thereafter on or about the — day of February, 1913, J. T. Craft was duly appointed and qualified as Administrator of said estate of said deceased. That the St. Louis, Iron Mountain and Southern Railway Company, is a railroad corporation duly organized and doing business under the laws of the State of Arkansas, and owns and operates a line of railway in and through Jackson County, Arkansas. That the deceased, Tom Craft, at all times hereinafter mentioned, was an employee of said defendant railroad company as a brakeman. That in the City of Argenta, Arkansas, the defendant Company maintains railroad yards in which are located a large number of tracks running parallel and a few feet distant between the rails. That at or about 2
24 o'clock a. m. on the 16th day of February, 1913, the said deceased, Tom Craft, was walking between said tracks in the yards of defendant company of Argenta, and in the performance of his duties as such brakeman; that it was a dark night, and there was no light in that part of the defendant Company's yards. That at and prior to that time, defendant Company negligently, through its agents, servants and employees, permitted a lot of bolts, knuckles and scrap iron and other material to be piled up between said tracks, and in a place where the deceased and other employees of defendant were accustomed to walk in the performance of their duty, thereby rendering the place unsafe, and the defendant knew, or by exercise of ordinary care, could have known of said unsafe condition. That about said hour on said date, said defendant Company, through its agents, servants and employees, negligently and with great force and speed propelled a coal car on the track, opposite to where plaintiff was walking, without warning, and negligently failed to place signals on said car, or any person thereon to give signals, or warning of its approach, and negligently failed to keep a look out thereon for persons who might rightfully be on said track or near thereto performing their duties. That at or about said hour and date, to-wit: about 2 o'clock a. m., on the 16th day of February, 1913, the said deceased, Tom Craft, while in performance of his duties as said brakeman, by reason of the negligence of the said defendant Company as aforesaid, was knocked or caused to fall beneath said coal car, thereby causing the wheels of said car to pass over and upon said deceased, inflicting upon his body many great and fatal injuries, which thereafter resulted in his death.

25 That the said deceased was a young man twenty-three years of age and unmarried, and left surviving him his father, J. T. Craft, who is 53 years of age, and who is dependent upon said deceased for support. That the said deceased was of good habits, sober and industrious, and at the time of his death was earning on an average of $100.00 per month, that he was in line of promotion and advancement, and would, had not death preceded, within a short time, been advanced and promoted and his salary increased to $200.00 per month. That during the life time of said

deceased, he contributed and set aside to the support of his father, J. T. Craft, from one-half to two-thirds of his income, and rendered many great and valuable personal services to his father, in that he nursed and cared for his father during sickness, administered to his wants, and looked after his care and comfort, and that the said defendant is in poor health, and had said deceased lived, said father would have received, during the remainder of his life from one-half to two-thirds of the income of said deceased, as well as a benefit of personal services rendered by said deceased, in nursing, caring for and looking after the needs and comforts of his said father. That by reason of the said negligence of the said defendant Company as aforesaid, in causing the death of the said Tom Craft the father has been damaged in the sum of Twenty Thousand Dollars.

Wherefore, premises considered, plaintiff prays for judgment against the said defendant company, for the benefit of J. T. Craft, father of said deceased, in the sum of Twenty Thousand Dollars, for cost and all proper relief.

26 III.

Comes plaintiff, and for further cause of action, reiterating all the allegations as set out in paragraph two hereof, and adopting the same as though set out as word for word herein, and asking that the same be considered as allegations in this paragraph, says:

That by reason of the injuries inflicted upon the said deceased as aforesaid, the said deceased lingered thereafter for the period of three hours and died. That during all of said time, the said deceased suffered great torture, physical pain, mental anguish, and the agonies of death, for all of which plaintiff prays damages for the Estate of said deceased in the sum of Ten Thousand Dollars.

Wherefore, premises considered, plaintiff, as Administrator of the Estate of the said Tom Craft, deceased, prays judgment for the benefit of said estate in the sum of Ten Thousand ($10,000.00) Dollars, for costs and all proper relief.

J. T. CRAFT,
Administrator of the Estate of Tom Craft, Deceased,
By JACKSON & JONES.
JONES & CAMPBELL.

Endorsed: 2791. J. T. Craft, Admr., vs. Iron Mt. Amended Complaint. Filed Feb. 2, 1914. Chas. E. Smith, Circuit Clerk.

27 In the Jackson Circuit Court, at the Winter Term thereof, to-wit: Friday, February 6", 1914, among others the following further proceedings were had and done, to-wit:

No. 2791.

J. T. CRAFT, Adm'r of Tom Craft, Deceased,
vs.
ST. L., I. M. & S. RY. CO.

Demurrer and Answer Filed—Demurrer Overruled.

Now on this day came the parties to this suit, by their respective attorneys and the defendant by its attorneys, by leave of the Court files its answer and demurrer herein. And said demurrer coming on to be heard, and the Court being sufficiently advised as to the law arising thereon, doth overrule the same.

It is therefore by the Court considered and adjudged that said demurrer be and the same is hereby overruled; to which judgment and ruling of the court in overruling said demurrer, the defendant at the time, by its attorneys, excepted, and to save its said exceptions asked that same be noted of record and made a part thereof, which was accordingly done. Thereupon came the plaintiff, by his attorneys, and elects to take a non suit as to the second and third paragraphs of his complaint herein.

28 *Demurrer and Answer to Amended Complaint.*

In the Jackson Circuit Court.

N. 2791.

J. T. CRAFT, Administrator of the Estate of Tom Craft, Deceased,
Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Defendant.

Demurrer.

Defendant demurs separately and severally to each paragraph of plaintiff's complaint upon the grounds that the same does not state facts sufficient to constitute a cause of action.

Answer.

Not waiving its demurrer herein, but still insisting upon the same as to each paragraph of plaintiff's amended complaint, the defendant answering said amended complaint states: That it has not sufficient knowledge or information upon which to found a belief as to whether or not the said Tom Craft departed this life on the 16th day of February, 1913, intestate, in Pulaski County, Ark., leaving no heirs at law, or that the said Tom Craft left only his father, J. T. Craft, surviving, and therefore denies, separately

and severally each of the allegations in that respect. Denies that on the — day of February, 1913, or at any time, the said J. T. Craft was appointed or qualified as Administrator of said Estate.

Defendant denies that at or about 2 o'clock a. m., or at any other hour, on the 16th day of February, 1913, or any other date, said Tom Craft was walking between said alleged tracks of defendant in the City of Argenta, or elsewhere, or was performing
29 his duties as brakeman; denies that it was a dark night; denies that there were no lights in that part of defendant's yards. Denies that at or prior to the time alleged, or at any time, at the place where deceased was walking, as alleged, or where it was necessary for him to walk to perform his duties, or elsewhere, the defendant, through any of its agents, servants, employees, or otherwise, either negligently or at all, permitted any bolts, knuckles, pins, drawbars, scrap iron or other material to be piled up between said tracks, or elsewhere; denies that thereby, or at all, said place was rendered unsafe; denies that said place was unsafe; denies that defendant knew, or by exercise of ordinary care could have known, of said alleged unsafe condition.

Defendant denies that at the hour or on the date alleged, or at any other time, the defendant, through any of its agents, servants, employees or otherwise, either negligently or with any force or speed, or at all, propelled any coal car, with any force or speed, on any track to the side of where deceased was walking; defendant denies that it negligently, or at all, failed to place signals on said alleged car; denies that it failed to place any person thereon to give signals of its approach; denies that it negligently, or at all, failed to keep a look out upon said car for persons who might rightfully be upon said track; denies that at or about said hour on said date, or at any other time, said Tom Craft, while in the performance of his duties as brakeman or otherwise, by reason of any negligence of defendant or otherwise, was knocked or caused to fall beneath said alleged coal car, or the wheels of said alleged car to pass
30 over him or any injuries to be caused to him.

The defendant, not having sufficient knowledge or information upon which to found a belief as to such allegations, denies that deceased was twenty-three years of age, or that he left surviving his father, J. T. Craft; denies that said J. T. Craft is dependent upon said Tom Craft for support; denies that deceased was of good habits, sober or industrious. Defendant denies that at the time of his death said Tom Craft was earning on an average of One Hundred Dollars per month or any other sum; denies that he was in line of promotion or advancement; denies that had not death preceded he would have been advanced or promoted or that his salary would have been increased to Two Hundred Dollars per month or any other sum; and defendant further states that — allegations contains no element upon which to base a recovery. Defendant denies that during the life time of deceased at any time he contributed or set aside to the support of his father from one-half to two-thirds or any *any* other portion of his income; denies that said deceased rendered any personal services whatever to his said

father; denies that he nursed or cared for his said father during sickness or administered to said father's wants or looked after his care or comfort; denies that said father is in poor health; denies that had said deceased lived his said father would have received, during the remainder of his life, or for any time, from one-half to two-thirds or any other portion whatever of the income of said deceased, or any benefit of personal services, or nursing or caring for or looking after the needs or comforts of said father, or
31 any services whatever. Defendant denies that by the injuries alleged, or otherwise, deceased suffered any physical pain, mental anguish or agonies of death for any period of time whatever; denies that plaintiff has been damaged in any sum whatever.

Answering the second paragraph or count of plaintiff's amended complaint, defendant states that it has not sufficient knowledge or information upon which to found a belief as to whether or not the said Tom Craft departed this life on the 16th day of February, 1913, intestate, in Pulaski County, Arkansas; and therefore denies separately and severally, each of the allegations in that respect. Denies that on the — day of February, 1913, or at any time, the said J. T. Craft was appointed or qualified as Administrator of said Estate. Defendant denies that at or about 2 o'clock a. m., or any other hour, on the 16th day of February, 1913, or any other date, said Tom Craft was walking between said alleged tracks of defendant in the City of Argenta, or elsewhere, or was performing his duties as brakeman. Denies that it was a dark night. Denies that there were no lights in that part of Defendant's yards. Denies that at or prior to the time alleged, or at any time, at the place where deceased was walking, as alleged, or where it was necessary for him to walk to perform his duties, or elsewhere, the defendant, through any of its agents, servants, employees or otherwise, either negligently or at all, permitted any bolts, knuckles, pins, drawbars, scrap-iron or other material to be piled up between said tracks, or elsewhere; denies that thereby or at all said place was rendered unsafe; denies that
32 said place was unsafe; denies that defendant knew, or by exercise of ordinary care could have known, of said alleged unsafe condition. Defendant denies that at the hour or on the date alleged, or at any other time, the defendant, through any of its agents, servants, employees or otherwise, either negligently or with any force or speed, or at all, propelled any coal car, with any force or speed, on any track opposite to where said Tom Craft was walking, or elsewhere, without warning or otherwise; defendant denies that it negligently or at all failed to place signals on said alleged car; denies that it failed to place any person thereon to give signals of its approach; denies that it negligently, or at all, failed to keep a look out upon said car for persons who might rightfully be upon said track or near thereto; denies that at or about said hour on said date, or any other time, said Tom Craft, while in the performance of his duties as brakeman or otherwise, by reason of any negligence of defendant, or otherwise, was knocked or caused to fall beneath said

alleged coal car, or the wheels of said alleged car to pass over him or any injuries to be caused to him.

The defendant, not having sufficient knowledge or information upon which to found a belief as to such allegations, denies that deceased was twenty-three years of age, or that he left surviving his father, J. T. Craft; denies that said J. T. Craft is dependent upon said Tom Craft for support; denies that deceased was of good habits, sober or industrious. Defendant denies that at the time of his death said Tom Craft was earning on an average of One Hundred
33 Dollars per month or any other sum; denies that he was in line of promotion or advancement; denies that had not death preceded he would have been advanced or promoted or that his salary would have been increased to Two Hundred Dollars per month or any other sum; and defendant further states that such allegations contain no element upon which to base a recovery. Defendant denies that during the life time of deceased at any time he contributed or set aside to the support of his father from one-half to two-thirds or any other portion of his income; denies that said deceased rendered any personal services whatever to his said father; denies that he nursed or cared for his said father during sickness or administered to said father's wants or looked after his care or comfort; denies that said father is in poor health; denies that had deceased lived his father would have received, during the remainder of his life or for any time, from one-half to two-thirds or any other portion whatever of the income of said deceased, or any benefit of personal services, or nursing or caring for or looking after the needs or comforts of said father, or any services whatever. Defendant denies that it was negligent and denies that said J. T. Craft has been damaged in any sum whatever.

Answering the third paragraph or count of plaintiff's amended complaint, defendant reiterates each and all of its denials to the allegations set out in the second paragraph or count of said amended complaint and hereby adopts each and all of said denials.

Defendant denies that any injuries were inflicted upon said Tom Craft by any negligence of this defendant; denies that by
34 reason thereof, or at all, said deceased lingered thereafter for any period of time whatever before he died; denies that said deceased endured *no* conscious pain or suffering whatever. Defendant denies that said Estate has been damaged in any sum and denies that it is liable to said Estate for any sum whatever.

II.

For its second and separate defense herein, as to each paragraph and count of plaintiff's amended complaint, defendant says that if it be true that said deceased was injured in any manner or to any extent as alleged (which defendant still denies), or that said father or said Estate has been damaged to any extent as alleged (which defendant still denies), such injury and damage were caused, produced and brought about by the negligence of the deceased himself, for which this defendant is in no way responsible; and defendant

hereby pleads such negligence on the part of deceased as a complete bar to any recovery herein.

III.

For its third and separate defense herein, as to each paragraph and count of plaintiff's amended complaint, defendant says that if it be true that said deceased was injured in any manner or to any extent as alleged (which defendant still denies), or that said father, J. T. Craft, or said Estate has been damaged to any extent as alleged (which defendant still denies), such injury and damage were the result and consequence of a risk and hazard which said de-
35 ceased voluntarily assumed and took upon himself, and for the consequences of which this defendant is in no way responsible; and defendant hereby pleads such assumption of risk by said defendant as a complete bar to any recovery herein.

Wherefore, having fully answered, defendant prays for judgment in its behalf herein, that it have its costs and all proper relief.

S. D. CAMPBELL,
F. R. SUITS,
Attorneys for Defendant.

Endorsed: No. 2791. J. T. Craft, Adm'r Est. Tom Craft, Dec'd. vs. St. L. I. M. & S. Ry. Co. Demurrer and Answer to Amended Complaint. Filed Feb. 6, 1914. C. E. Smith, Clerk.

36 In the Jackson Circuit Court, at the Winter Term thereof, to-wit: Saturday, February 7", 1914, among others the following further proceedings were had and done, to-wit:

No. 2791.

J. T. CRAFT, Adm'r,
vs.
ST. L., I. M. & S. RY. CO.

Verdict & Judgment.

Now on this day this cause coming on to be heard upon the regular call of the docket, and the plaintiff appearing in person and by attorneys, Jones & Campbell, and the defendant appearing by its attorneys, Messrs. Campbell & Suits, and both sides announcing ready, thereupon came a jury composed of L. B. Harris and eleven others of the regular panel, who, after hearing the evidence, the instructions of the Court and argument of counsel, retired to consider of their verdict; and afterwards returned into Court the following verdict, to-wit:

"We, the jury, find for the plaintiff, in the sum of $11,000.00 as damages for the pain and suffering of deceased; and $1,000.00 as damages for contributions to J. T. Craft, as father of the deceased.

L. B. HARRIS, *Foreman.*"

To which verdict defendant objected and objections being overruled, defendant excepted before the jury was discharged from the case.

It is therefore considered, ordered and adjudged by the Court, that the plaintiff, J. T. Craft, as Administrator of Est. of Tom Craft, deceased, do have and recover of and from the defendant, St. Louis, Iron Mountain & Southern Railway Company, the sum of
37 One Thousand Dollars as pecuniary loss and the sum of Eleven Thousand Dollars on account of pain and suffering, aggregating the sum of Twelve Thousand Dollars, together with all his costs herein laid, paid out and expended, for which exception may issue; to which judgment defendant excepts.

38 In the Jackson Circuit Court, at the Winter Term thereof, to-wit: Saturday, March 7", 1914, among others the following further proceedings were had and done, to-wit:

No. 2791.

J. T. CRAFT, Adm'r Est. of Tom Craft, Deceased,
vs.
ST. L., I. M. & S. RY. CO.

Motion for New Trial Filed.

Now on this day comes the defendant by its attorneys, S. D. Campbell & F. R. Suits, and by leave of the Court files its motion for a new trial of this cause, and this order having been made on February the 19th, 1914, it being the 16th day of the present term of this court, and not having been entered of record, it is ordered to be entered now for them, which is done.

(For motion for a New Trial see pages 192 to 205.)

39 In the Jackson Circuit Court, at the Winter Term thereof, to-wit: Saturday, March 7", 1914, among others the following further proceedings were had and done, to-wit:

No. 2791.

J. T. CRAFT, Administrator of the Estate of Tom Craft, Deceased, Plaintiff,
vs.
ST. L., I. M. & S. RY. CO., Defendant.

Motion for New Trial Overruled. Ex. Appeal Granted. 120 *Da. to File Bill of Exceptions.*

On this 7th day of March, 1914, came on to be heard the motion of the defendant for a new trial herein, which motion had heretofore been duly and timely filed by the defendant; thereupon came

the plaintiff, by his attorneys, Jones & Campbell, and also came the defendant, by its attorneys, S. D. Campbell & F. R. Suits, and after argument of counsel said motion is submitted to the Court and the Court being advised as to the law arising thereon is of the opinion and doth find that said motion should be overruled.

It is therefore by the Court considered, ordered and adjudged that said motion for a new trial be and the same is hereby overruled, to which action, order and judgment of the Court in overruling said motion the defendant at the time duly saved its exceptions and asked that the same be noted of record, which is hereby accordingly done, and the defendant prayed and was granted an appeal of this cause to the Supreme Court of Arkansas, which is granted and the defendant is further granted one hundred and twenty days' (120)
40 time from this date within which to prepare and file its Bill of Exceptions herein, which, when filed, shall be taken as a part of the records in this cause.

41 In the Jackson Circuit Court, Spring Term, 1914.

No. 2791.

J. T. CRAFT, Administrator of the Estate of Tom Craft, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Bill of Exceptions.

Be it remembered, That on February 6, 1914, a day of the regular Spring Term, 1914, of the Jackson Circuit Court, held at Newport, Arkansas, before the Honorable R. E. Jeffery, Regular Judge, and a jury, the above entitled cause came on for trial; during the course of which trial evidence was introduced, objections made, exceptions taken, and other proceedings had; all of which are as follows, to-wit:

42 The plaintiff, to sustain the issues on his behalf, introduced the following witnesses and testimony, to-wit:

Testimony of A. J. Speer.

A. J. SPEER, witness for the plaintiff, being produced and first duly sworn, testified as follows, to-wit:

Direct examination.

By GUSTAVE JONES, Esqr.:

Q. State your name to the jury?
A. A. J. Speer.
Q. Where do you live?
A. 201 East Sixteenth, Argenta.

Q. What is your business?
A. Conductor for the St. Louis, Iron Mountain & Southern Railway.
Q. Were you working in that capacity on the 16th day of February, 1913?
A. Yes, sir.
Q. In what capacity?
A. Conductor.
Q. In charge of what?
A. Train 66.
Q. What train was that?
A. Train 66.
Q. Where did that train move from and to?
A. It was moving from Argenta to St. Louis.
Q. St. Louis?
A. Or Hoxie; Hoxie was its next division.
43 Q. What was it hauling?
A. Sir?
Q. What was it hauling, freight or passengers?
A. Freight train, stock, freight, merchandise.
Q. What was the destination of the stock?
A. East St. Louis; National Stock Yards.
Q. East St. Louis, that is in what State?
A. East St. Louis, that is in Illinois.
Q. Do you know where the stock come from?
A. No, sir; don't remember.
Q. Was Tom Craft in your crew?
A. Yes, sir.
Q. In what capacity?
A. He was going to work as head brakeman that night.
Q. On that train?
A. Yes, sir.
Q. On that day, Mr. Speer, do you remember on what track your train was, this particular train No. 66?
A. Made up on No. 5.
Q. Were you called for that train?
A. Yes, sir.
Q. At what hour?
A. Two A. M.
Q. And do you know whether Tom Craft was called for that train?
A. Yes, sir; it was reported to me that he was called for that train.

Defendant objectes to foregoing answer; sustained.

44 Q. Did he report to your train?

Defendant objects.

A. Yes, sir.

Defendant objects.

Q. Did you give him any directions with reference to the train at the time he was there?

Defendant objects.

Q. Well, what was he doing? What was Tom Craft doing?

Defendant objects.

A. He was—I met him between track five and six just before we departed, just before time to depart.

Defendant objects.

Q. Well, did you give him any directions as to his work.

Defendant objects.

Q. Was he working under you, Mr. Speer?

Defendant objects.

A. Yes, sir, he would have been.

Defendant objects.

Q. Well, I will just ask the question if you know what was he doing somewhere about two o'clock on the morning of the 16th of February, 1913?

Defendant objects.

A. Me and him was walking between track five and six towards the engine.

Defendant objects.

Q. What was he doing, if anything, if you know, at that time? What was he going to do?

Defendant objects.

A. We was going towards the engine; we was ready to leave town.

Defendant objects.

Q. Had he gone back in the direction of the caboose at any time.

Defendant objects.

45 A. Yes, sir.

Defendant objects.

Q. For what purpose, if you know?

Defendant objects.

A. I had asked him to go back to see if the caboose had been placed on the rear end of the train; and he had went back and saw that it was on there and I had met him some ten or twelve car lengths——

Defendant objects.

Q. You met him coming back?

Defendant objects.

A. Yes, sir.

Defendant duly objected, separately and severally, to each of the

foregoing ten questions and each of the foregoing eight answers; and requested the court to exclude from the jury each of said answers; but the court overruled each of said objections and refused to exclude any of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally and in each separate instance.

Q. Was that one of his duties? Was he doing what you directed him to do?

Defendant objects; overruled; exceptions saved.

Q. Do you remember the question?

A. Yes, sir, he had done as I told him and come back and told me the caboose was on the train; and I told him we was ready to leave town; and we walked between five and six towards the engine.

Defendant duly objected to foregoing answer, and requested the court to instruct the jury that same was incompetent testimony and to rule it out.

46 By the COURT: The testimony of the witness as to what the deceased told him is incompetent evidence, Gentlemen, and ought not be considered by you, should not be.

Q. Where was his position on the train as head brakeman when the train was running?

A. On the engine or near the engine.

Q. That is the position of the head brakeman?

A. Yes, sir.

Q. Do you know about how far—well, first how many tracks were there in the yards, if you remember, there—at that particular point where this train was made up?

A. I think there are twenty-eight tracks on that side of the yard.

Q. The track your train was on was track No. 5?

A. Yes, sir.

Q. How did the tracks number from that?

A. Track No. 2 is next to the north main, and they number plum-to 28 East.

Q. That would be running east then?

A. Yes, sir.

Q. What track would be immediately east of the track your train was on?

A. No. 6.

Q. Have you had occasion to observe the distance between tracks five and six between the rails?

A. No, sir. I had no reason to measure it.

Q. Would you venture an opinion?

A. I think five and six is as wide as any track there is in the yards; I judge so.

47 Q. Did you observe a coal car, or did you observe anything on track six as you walked along towards the engine, as you stated?

A. As I was walking towards the engine, he was following me; and I met this car coming in there and hollered and told him.

Q. Met what car?
A. A coal car.
Q. A coal car on what track?
A. No. 6.
Q. About how far had you walked before you noticed the coal car?
A. I suppose he was about probably 200 feet from the lead, 150 or 200 feet.
Q. That would be about—how many car-lengths?
A. An average car is 34 feet long.
Q. Was the coal car moving?
A. Yes, sir.
Q. And it was coming down, you say, track No. 6; do you know how far you were from the engine of your train?
A. Oh, I would judge four or five cars; three or four; somewhere along there.
Q. Can you recall of what your train consisted, whether it was all box-cars, gondolas, coal cars, or what?
A. No, sir, I haven't——
Q. What is your best recollection about that?
A. Well, I couldn't say; I don't remember; I suppose probably a few low cars in the train; there usually is.
48 Q. What was the condition of the yard with reference to light at that point.

Defendant objects; overruled; exceptions.

Q. Well, was it light or dark?

Defendant objects.

A. It was night; two o'clock in the morning.

Defendant duly objected, separately, to the foregoing question and answer; each of which objections the court overruled; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Two o'clock in the morning, but notwithstanding——
A. About that.
Q. Was it dark or light?
A. I don't remember whether the moon was shining or not.
Q. Now, how close—Well, this coal car, were there any lights on the coal car?
A. No, sir.
Q. Was any person on the coal car?
A. Didn't see anybody.
Q. Well, if there had been, wouldn't you have seen them?

Defendant objects.

Q. Well, you can tell the jury whether or not there was anybody on the coal car?
A. Don't think there was.
Q. How near did the car get to you before you observed it?

A. Oh, probably eight or ten feet.
Q. Right at you?
—. ——.
Q. What did you do when you saw the car?
A. I hollered and told Tommy to look out, there was a car.
Q. And what occurred at that instance?
A. Well, just an instant after that, I heard him holler and
49 returned back to where this car was and found that it had run over him, knocked him down.
Q. Now, did you notice anything there, Mr. Speer, in the space between tracks five and six?
A. I don't understand what you mean.
Q. Well, anything in the nature of material or scraps or anything of that kind?
A. Some obstruction.
Q. Yes, sir.
A. Yes, there was three or four knuckles lying there, probably——
Q. What do you call knuckles?
A. Well, the knuckles are the fastenings for the cars to couple together with.
Q. About what size are they?
A. Well, the size of a knuckle is about three inches across and about eight inches and a half long; and then they have a shank to them—we call it.
Q. The knuckle would weigh how much?
A. Thirty pounds each.
Q. You had observed them as you went by, had you, or had you not?
A. I hadn't paid no attention to them at all.
Q. Now, you got back to where he was under the car?
A. Yes, sir, I went right to him when I heard him.
Q. Now, I wish you would explain to the jury, Mr. Speer, just the position you found him in, his body and the wheels of
50 the car; just in your own way, explain it to them as definitely as you can?
A. Well, that is sorter hard to explain to them; I will do the best I can if you will allow me to go over there to that bench.
Q. All right.
A. Well, now, for instance, this is the car. Now, you Gentlemen understand those tracks run north and south, and we will call this a coal car, like this; and here is a lead comes across like this; all the rest of these tracks leads right down here like this (indicating). Me and Tommy was walking up between five and six along here, and this car was kicked in from the lead; guess you Gentlemen all understand what a lead is. We will say this is a lead; runs like this; there is your tracks (indicating); now at each of these connections is a switch stand right here; this is No. 4 and 5, and 6 and 7, and 8 and plum- on down to No. 28. Now, me and Tommy was walking between No. 5 and 6; and our train was made up in here; engine was on and caboose on; engine standing up here in the clear and

caboose back here. They had throwed this switch and we called it kicking this car right in here. And I saw it and got out of the way and hollered to Tommy and he for some reason didn't get out of the way and it struck him and knocked him down; and when I returned to him—there is one pair of wheels here, and here and here; I found him lying face down. This wheel, was the south wheel, had passed over his body or hips; the best I remember was about
51 his hips; and this wheel you might say had tried to run over him and the speed of the car wasn't enough for it to pass over him and you might say it had stopped; might say, you Gentlemen will understand it, he had scotched it; his body had stopped the car; and his face—he was lying face down in here and his feet was out like this; but this wheel was on his body right there (indicating).

By JUROR: Which side of the car was on him?

A. That was the west side; you see, between five and six. His feet was sticking out between five and six and his head was in between the rails on track No. 6.

Q. His body was lying then practically east and west, with his feet to the west and head to the east?

A. Yes, sir; and one leg was doubled up under him. And I seen the switchman change No. 6 switch just as he was run over and hollered and told him not to let any more cars in there; which the cars would have gone in; had cut some cars; the next one was coming back to No. 6, and he changed it and didn't let no more cars come in there. And we got help around there as quick as we could and run and got the pinch bar; didn't couple into this car with the engine at all.

Q. Who was it went after the pinch bar?

A. I think it is Mr. Tanner, if I remember right.

Q. Know what place he had to go?

A. Yes, sir, probably 75 yards; 50 or 75.

Q. Had to go to the tool house, didn't he?

52 A. Yes, sir, stands right up in here somewhere (indicating). He ran up there and got that bar.

Q. And then come back?

A. Yes, sir.

Q. What was done with the pinch bar?

A. We placed it under this wheel and moved this car off of him as good—as easily as we could; and found his body—we couldn't get it out between the arch bar and the rail.

Q. What is the arch bar?

A. Well, you see, here is a truck frame—well, there is a wheel stands right along there, you know, and another wheel down there, and the truck boxes here; and this arch bar, we call them; real name is tie bar.

Q. The arch bar was too low for his body to come through?

A. Something like that (indicating); there is a space about six inches; his body was all inside the rail and it would be impossible to pull him out over the rail under that without the car was moved up; and we lifted the weight of the car off his body and brought

him out right in here between five and six and placed him on a cot and carried him up to the yard office; we will say right here (indicating); something like that. Here would be No. 3 and No. 2, and No. 1 since the double track has been made is the north bound main.

Q. When you got down there where he was, and while you were working with him, using the pinch bar, what was he doing?

A. He was lying face down right with his body in between the rails, feet on the outside.

53 Q. What was he doing?

A. Well, I called to him several times, and he never answered me. Couldn't get no answer.

Q. Well, did you hear any sounds coming from him?

A. I heard him groaning.

Q. Well, was he alive or dead?

A. He was alive; his pulse was beating.

Q. How long would you say to the jury it was from the time you first heard him halloo, as you said, until you got the upper wheel of that truck off of him and got him——

A. I think the best I remember it was about fifteen minutes.

Q. Then somebody—How did they get him out from under the car?

A. Well, there was me and Mr. Tanner and Mr. Honeycutt; oh, there was seven or eight of us, and one or two of the car men—I don't know their names; all of us worked and taken him out as quick as we could.

Q. Was it necessary for some of you to get under the car to lift him?

Defendant objects.

Q. How did you have to take him out from under where he was?

A. Just had to crawl up under the car and catch him by the body and work him out as best we could.

Q. You had to move him up over the rail towards underneath the car and then around?

A. And bring him out.

Q. Then you placed him on a cot, you say?

A. Yes, sir.

54 Q. And then on that cot you carried him to the office?

A. Yes, sir.

Q. Now then, from the office where did he go?

A. They put him *on* an ambulance and that is the last I saw of him.

Q. Were you there when the ambulance came?

A. Yes, sir, I saw the ambulance come.

Q. How long after he had gotten into the office was it before the ambulance came?

Defendant objects.

A. I think the best I remember, the way we figured that night, it was about twenty-seven or thirty minutes from the time of the accident.

Defendant objects.

Q. Just as near as you can recollect, you say how long it was?

Defendant objects.

A. Not over thirty minutes.

Defendant duly objected, separately and severally, to each of the foregoing two questions and two answers; and requested the court to exclude each of said answers from the jury; but the court overruled each of said objections and refused to exclude either of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Do you know what ambulance it was that came?

Defendant objects.

A. No, sir, I don't remember whose ambulance.

Defendant objects.

Q. You don't know whether it was Reuble's or not?

Defendant objects.

A. No, sir, I do not.

Defendant objects.

Q. Do you know where the ambulance came from?

Defendant objects.

55 A. No, sir, I don't know; it came from over *in* the Little Rock side, but I don't know what stable.

Defendant objects.

Q. To come from Little Rock, it would have to cross either the Iron Mountain Bridge or the free bridge, wouldn't it?

Defendant objects.

Q. Would it or would it not?

Defendant objects.

Q. How would it have to come from Little Rock? Then put it in that form.

Defendant objects.

A. Why, have to cross the free bridge, I suppose.

Defendant objects.

Q. Do you know where Reuble's stable is from where the ambulance starts?

Defendant objects.

A. No, sir.

Defendant objects.

Q. Now, the free bridge is at the foot of Main Street in Little Rock, isn't it?

Defendant objects.

A. Yes, sir.

Defendant objects.

Q. On what street, at the foot of what street is the free bridge you spoke about at Little Rock?

Defendant objects.

A. Foot of Main Street; Washington Avenue on the Argenta side.

Defendant objects.

Q. Now, when it gets over to the Argenta side, how far is it there at the end of that bridge, the Argenta end of it, to the office where Tommy Craft was?

Defendant objects.

A. About eleven blocks, I guess, the way they would have to go.

56 Defendant duly objected, separately and severally, to each of the foregoing nine questions and eight answers relative to the ambulance, etc. And requested the court to exclude from the jury each of said answers; but the court overruled each of said objections and refused to exclude any of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally and in each separate instance.

Q. Do you know who was in the ambulance?
A. No, sir.
Q. Do you know who was driving it?
A. No, sir.
Q. How long had you known Tommy Craft?
A. Oh, ever since he had been transferred to the Arkansas Division.
Q. Do you know how long that was?
A. No, sir, I don't remember.
Q. Now, all the time you were taking him out from under the car, what could you hear, if anything?
A. I heard him groan several times.
Q. Now, were you there when they placed him on the cot?
A. Yes, sir.
Q. What effect did that seem to have upon him?

Defendant objects: Sustained.

Q. Well, what manifestation, if any, did he make?
A. He was unconscious.
Q. Well, you don't know that, do you? You are not a doctor?
A. Well, I know he couldn't speak.

Q. Did you hear him give any manifestations of pain and suffering?

A. I heard him give a low, mournful groan once in a while.

57 Plaintiff requested the court to exclude from the jury the statement of the witness that deceased was unconscious, which the court declined to do.

Q. Well, all you know is that he couldn't speak, Mr.——

A. He never spoke to me and I called to him several times.

Q. Do you know where the wheels struck him, Mr. Speer?

A. I think it was about the hips.

Q. Right across the hips?

A. I think so, yes, sir.

Q. What time elapsed from the time you said to him "Look out, car was coming"?

A. Sir?

Q. I believe you said you hollered back to him, you hollered "Look out, there is a car coming." How long after that now was it that you heard him scream or halloo?

A. Oh, I couldn't say; maybe six or seven seconds.

Q. Six or seven seconds?

A. Maybe little longer than that.

Q. Do you suppose it would be any longer than that?

A. I suppose he was walking about ten or twelve feet from me.

Q. Did you observe the blood stains on the rails there?

A. No, not that night I don't believe I did.

Q. Sir?

A. I don't think I did.

Q. Now, with reference to that pile of knuckles, was the body, was the body of Tom Craft, lying as you have described, north or south of that?

A. I don't remember whether north or south.

Q. Sir?

58 A. I don't remember whether it was north or south; it has been so long ago; it has been a year ago, very nearly.

Q. Do you remember the distance from that pile of knuckles?

A. No, sir, not at this time.

Q. Now, you say you don't recall whether it was a moonlight night or not; was there any lights in the yards?

A. Nothing only head lights in the engine.

Q. Now, at that place was it dark or light?

A. I don't remember.

Q. You don't recall?

—. ——.

Q. Now, right at that particular place where you and he were walking at the time you spoke of, you recall, Mr. Speer, that your train was box-cars right along there?

Defendant objects as leading.

Q. Or do you recall? What do you recall about it?

A. I don't remember whether it was all box-cars; might have been a low car in between.

Q. You made a statement with reference to this matter some time ago while the facts were somewhat fresh in your mind?

D'f't objects.

Q. Well, I will ask you this question: You have made a statement with reference to your knowledge of the facts in this case? Did you?

Defendant objects.

A. I made a statement to the coroner's jury when I returned to Argenta.

Defendant objects.

Q. How long was that after the accident?

Defendant objects.

A. I expect it was two days.

Defendant objects.

59 Q. Wish you would read this, please, sir. (Handing witness paper.)

Defendant objects.

Now, Mr. Speer, since you have refreshed your recollection, what can you tell the jury now as to what your recollection is as to the character of the cars in your train at that place?

Defendant objects.

A. Well, they would more than likely all be high cars at that point, near the engine.

Defendant duly objected, separately and severally, to each of the foregoing four questions and three answers; and requested the court to exclude from the jury each of said answers; but the court overruled each of said objections and refused to exclude any of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. What do you recall, or do you know whether or not along there where he and you were walking, and in the region of the accident, there was shadow or light?

A. No, it has been so long I don't remember; it has been a year, very near it.

Q. Do you remember where that pile of knuckles was, Mr. Speer?

By Mr. CAMPBELL, for Defendant: Wait a minute, Your Honor.

By the COURT: Go ahead and answer the question.

A. It was between the tracks five and six.

Q. Mr. Speer, would you recognize, you think, the clothes that Tom Craft wore at that time?

Defendant objects.

A. Well, I couldn't say that I could. I don't know how the pants was——

Defendant duly objected, separately, to foregoing question and answer; each of which objections the court overruled, and the defendant at the time duly saved its separate exceptions thereto.

60 By Mr. CAMPBELL, for Defendant: I am objecting to this display that he is trying to make. I am objecting to that, Your Honor, because it is not responsive to any question asked; just an attempt to prejudice the minds of the jury by making a display of the clothing.

By the COURT: Let the record show that there is no offer made yet, Mr. Stenographer.

By Mr. CAMPBELL, for Defendant: Want it to show what the facts are; that attorney for the plaintiff makes a display here before the jury.

By Mr. JONES, for Plaintiff: That is not a fact. The witness is called from the stand.

By the COURT: There has been no offer made yet.

By Mr. CAMPBELL, for Defendant: I am objecting to that demonstration.

By the COURT: Let the record show there is a table between the clothing and the jury.

By Mr. JONES, for Plaintiff: And the attorney is between the jury and the clothing.

Q. Mr. Speer, can you identify the clothing of the deceased?

By Mr. CAMPBELL, for Defendant: Wait a minute; I am asking the court to instruct the jury that is improper and to reprimand counsel for making this display here; I am asking that.

The Court overruled defendant's objections, refused to instruct the jury that such proceeding was improper and refused to
61 reprimand counsel; whereupon the defendant at the time duly saved its exceptions, separately and severally, to each of said rulings of the court.

Q. Mr. Speer, can you identify the clothing that has been shown to you in the presence of the jury as the clothing that the deceased had on at the time of the injury?

By Mr. CAMPBELL, for Defendant: Defendant objects because it embraces a proposition there in that question "In the absence of the jury", when the jury is present, as a matter of fact; and I am objecting to that question on that specific ground because it is a matter of fact that the jury is present right here, and this display is made here.

Q. I will say out of sight of the jury, when you examined them out of sight of the jury?

By Mr. CAMPBELL, for Defendant: I ask the court to instruct the jury that.

By the COURT: Let the jury go back to the jury room for the present. (The jury retires to the jury room.)

A. I wouldn't swear——

By the COURT: You still ask that question, do you?

By Mr. JONES, for Plaintiff: Yes, sir.

Q. I ask you, Mr. Speer, if the clothing which has been shown you, which I now exhibit to you in the absence of the jury, whether you can identify it or not as the clothing that Tommy Craft, the deceased, had on at the time of the injury?

A. I don't remember the color of the pants or the color of the clothes that he had that night, but I remember they were torn bad once here (indicating) and part of the flesh showing through the clothing.

Q. What I want to know is if you can——

A. I wouldn't swear those are the clothes because I don't remember the color of them. I know they was torn.

62 (The jury returns to the Court room.)

By Mr. CAMPBELL, for Defendant: I ask the Court to instruct the jury that all this demonstration about the clothing is improper.

By the COURT: Overruled, because it has not been in evidence.

By Mr. CAMPBELL, for Defendant: I am asking the court to instruct the jury that it is not in evidence and has nothing to do with this case at all; and also to reprimand counsel for that display.

By the COURT (addressing jury): Gentlemen, nothing that has been said about the clothing, nor the fact that there is clothing here in the room can be considered by you as evidence in this case, one way or another.

By Mr. CAMPBELL, for defendant: And I ask the court to reprimand counsel for that, too.

The Court refused to reprimand plaintiff's counsel for making a display of some clothing, as requested by defendant; whereupon the defendant at the time duly saved its exceptions to such ruling of the court.

Q. Mr. Speer, since the jury retired, have you examined the clothes that were exhibited to you.

Defendant objects.

A. I never touched the clothes.

Defendant objects.

Q. You looked at them?

Defendant objects.

A. I looked at the vest and pair of pants you held up.

Defendant objects.

Q. You can't identify them as the clothes that deceased wore at the time?

Defendant objects.

A. No, I wouldn't swear to that.

Defendant duly objected, separately and severally, to each of the foregoing three questions and answers; and requested the court to exclude each of said answers; but the court overruled each of said objections and refused to exclude any of said objections; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

63 Cross-examination.

By S. D. CAMPBELL, Esqr.:

Q. Mr. Speer, how long had you known Mr. Tom Craft?

A. Well, I couldn't tell you, Mr. Campbell; I had knowed him a while when he worked on the White River Division, then he come down and worked with us a while, but I couldn't exactly remember the time.

Q. You called him "Tommy"; he is the same person that you mention as calling him "Tommy", is he?

A. Yes, sir.

Q. And you and Mr. Tommy Craft were walking together there in the yards at Argenta, weren't you?

A. We was walking north between—I was coming north and he was following me between track five and six.

Q. He was following you?

A. In the neighborhood of two o'clock that morning.

Q. About how closely was he following you, tell the jury?

A. Well, I judge somewhere ten or twelve feet; might have been further; might have been nearer.

Q. Something near ten or twelve feet?

A. Just about like two men walks along, one behind another, along the track in conversation; might possibly have been fifteen feet and might have been closer than that.

Q. You have testified, I believe, in your examination in chief, that you saw this coal car coming, did you?

A. Yes, sir.

Q. Was there any reason why Mr. Craft, couldn't see it as well as you did?

A. Well, I was in front of him; that is the only reason I
64 could see.

Q. About how far in front?

A. Probably eight or ten feet; something like that, maybe further, maybe nearer; I had a lantern and he had a lantern, both walking——

Q. You had a lantern and he had a lantern?

A. Yes, sir.

Q. You got out of the way of that coal car?

A. Yes, sir.

Q. And he had a lantern?

A. Yes, sir.

Q. He was just about ten or twelve feet from you?

A. I judge something about that; might have been closer; might have been farther.

Q. And you, walking along there ten or twelve feet in front of him, hallooed to him that that coal car was there, too, as I understand it?

A. I hollered to him and told him to look out, there was a car coming.

Q. He was only about ten or twelve feet from you?

A. I judge so, yes, sir.

Q. When you hollered to him, you gave him warning before you—you were in front of him before you got over there in a place where that coal car was coming up the track, the switch tracks—is that true?

A. Yes, I hollered at him.

Q. Now, did you holler to him to look out for that coal car?

A. I hollered and told him to look out there was a car coming.

Q. And that is the car that struck him?

65 A. Yes, sir, that is the car I found him under.

Q. How long did you holler to him to look out for that car before he was struck?

A. It was just a very few seconds until I heard him holler, and I went right back to where the car stopped and found him.

Q. But you were in front of him; and being in front of him, you hollered to him to look out for that car?

A. Yes, sir.

Q. I believe you stated that when he was struck by that car, that you had hollered out to him to look out for, that when you found him he was unconscious?

A. I tried to get him to speak two or three times and he never did make no answer.

Q. Never did make no answer?

A. No, sir. I heard him groan; that is the only——

Q. You heard him groan. Didn't make no answer?

A. I never could get no answer from him.

Q. And you had given him warning to look out for this car? Just in front of him and had given him warning to look out for this car?

A. I hollered to him, yes, sir.

Redirect examination.

By Mr. JONES:

Q. When you found him, he was lying face down, was he?

A. Yes, sir.

Q. What was in the—between the track and where his face was resting?

66 A. Well, there was—those tracks are usually filled with cinders; I think they stand about three or four inches above the——

Q. Do you know who lifted him up and got his face out of cinders, if anybody?

A. I think the yard master, for one particular man, was under there.

Q. While you were talking to him and trying to get him to say something to you, his face was in the cinders?

A. He was lying inside.

Q. Do you know what the length of that coal car was, Mr. Speer?

A. No, sir, I don't.

Q. Well, now, before you turned back, or before you heard him holler, how far past you had the coal car gotten?

A. When I hollered?

Q. Yes?

A. It was about even with me.

Q. Which end?

A. Why, you see, I was south of the car and it was travelling south; I was going north; that would make me facing the car.

Q. Then the car got entirely by you, didn't it?

A. I must have hollered about the time it got even with me.

Q. Just about the time it got by you?

A. I couldn't say, but I know I saw it and hollered to him, it might have been six or eight feet ahead of me and might have been right even with me.

67 Q. But before you got back to it, the car had gotten entirely by you?

A. No, I think the car stopped.

Q. You didn't follow the car down?

A. No. I think the car stopped. I was something near the north end of it, if I remember right.

Q. It had about gotten by you?

A. Pretty near it, yes, if I remember right.

Q. Now, Mr. Speer, what attracted your attention to the car?

A. I saw it.

Q. Well, now, did you see it first?

A. I saw it just as it got to me.

Q. Or did it touch——

A. No, I couldn't say as it touched me.

Q. Now, as a matter of fact, Mr. Speer, isn't it true that your attention was attracted to this car because it brushed you?

Defendant objects to foregoing question; sustained.

Q. Did you see it first or feel it first?

A. I think I saw it; saw it right in front of me.

Q. Do you remember about that?

A. No, not particular about the——

Q. You say you don't remember?

A. Don't remember now, no, sir.

Q. Now, those lanterns that you had, Mr.—that you had and that he had; what is the purpose of those lanterns?

A. For giving signals.

Q. For giving signals and not for shedding light?

68 A. Well, they show some light; don't know how much; you can see how to get over a train with them at night; see how to walk around with them.

Q. You were ahead of him with your lantern?

A. Yes, sir.

Q. Going up towards your engine, the direction you and Tommy were going, track No. 6 would be to which of your hands, right or left?

A. Five is on the left hand side, and six on your right, as you are going north.

69 *Testimony of N. B. Pyles.*

N. B. PYLES, witness for plaintiff, being produced and first duly sworn, testified as follows, to-wit:

Direct examination.

By GUSTAVE JONES, Esqr.:

Q. State your name to the jury?

A. N. B. Pyles.

Q. Where do you live?

A. I live in Argenta, Arkansas.

Q. What is your business?

A. Engineer.

Q. What was your business on Feb. 16, 1913?

A. I was handling the switch engine in the Argenta Yards.

Q. For what railroad?

A. St. Louis, Iron Mountain & Southern.

Q. Did you know Tom Craft?

A. No, sir, I didn't know him; not personally.

Q. Did you hear of his being injured on that day, that morning?

A. Yes, sir.

Q. Did you see him after the accident?

A. Yes, sir.

Q. What were you engaged in at that time before you went to where he was.

A. I was on the switch engine.

Q. You were on a switch engine, and did you have some coal cars to switch?

A. Well, we had hold of a bunch of cars; they were mixed; some box-cars and some coal cars.

70 Q. Do you know whether you handled a car on Track No. 6 about that time?

A. Yes, I know the car went down there; you see, I didn't know anything about where the cars go.

Q. I understand. Until afterwards.

—. ——.

Q. Did you kick that car in on track six?

A. Yes, sir.

Q. Was anybody on it?

A. Not that I know of.
Q. Was any light on it?
A. I don't know.
Q. Did you get down to where he was?
A. Yes, sir, I went down there.
Q. How far did you have to go from your engine to where he was?
A. Well, I suppose it was ten or twelve car-lengths.
Q. Where did you find him?
A. He was under a coal car.
Q. Under a coal car.
A. Yes, sir.
Q. What coal car was it?
A. I don't know the number of it.
Q. With reference to the ones that you had been handling?
A. Well, it was one that we had kicked down that track.
Q. Now, did you go down between tracks five and six, or other tracks?
A. No, sir, I went down between tracks six and seven.
Q. When you got down there, what did you find with reference to Tom Craft?
71 A. There was several men there; they were trying to get him out from under the car.
Q. Where was he?
A. He was under the south end of the car between the trucks; his feet out on the outside of the rail and his body, part of his body, was inside the track.
Q. What was he doing, if anything?
A. I couldn't tell from where I was there; there was two men under there trying to get him loose; I couldn't tell; I didn't go under the car; there was two men under there.
Q. What did you hear from him, if anything?
A. I could hear him groaning.
Q. Were you there when they got him out?
A. Yes, sir.
Q. What was done with him then?
A. He was carried up to the yard office.
Q. First he was put on a stretcher?
A. Yes, sir.
Q. Did you go up to the yard office with him?
A. Yes, sir.
Q. What did you observe as they was carrying him up?
A. I didn't see him as they was carrying him; when I got up there I went and looked at him and went back to my engine.
Q. What did you hear emanating from him ever- once in a while?
72 A. I could hear him groaning every once in a while.

Cross-examination.

By S. D. CAMPBELL, Esqr.:

—. How many times did you hear him groan after he was struck, Mr. Pyles?

A. Well, I couldn't say as to that.

Q. Do you know when he died?

A. No, sir, I do not.

Q. And you can't tell how long you heard him groan after he was struck?

A. Oh, it was, I guess, five minutes probably before I went down there after the car hit him; I didn't know what was wrong.

Q. About five minutes?

A. Yes, sir.

Q. How long was it after he was struck until the last time you heard him groan after you got there?

A. Well, it was while they was taking him out from under the car was the last time I heard him groan.

Q. About how long was that?

A. Well, I suppose it was ten minutes, maybe.

Q. After you got there?

A. Yes, sir.

Q. When was the last time you heard him groan? Was it while they were taking him out from under the car?

A. Yes, sir, I think it was.

Q. When they were taking him out from under the car?

A. Yes, sir.

73 Q. And that is the last time you heard him groan, when they were taking him out from under the car?

A. Yes, sir.

Q. Do you know, of your own knowledge, how long that was after he was struck, of your own personal knowledge?

A. Well, I think it was about ten minutes from the time he was struck until they got him out from under the car.

Q. How do you know that?

A. Well, I don't know it for sure; it seemed about that long.

Q. Seemed about that long to whom? To you?

A. Yes, sir; to me, yes, sir.

Q. Well, now, how did you get knowledge of that ten minutes?

A. Somebody called their attention to what time it was it happened.

Q. Who was it called their attention?

A. I don't know who it was. There was quite a number around there; train crew.

Q. You think then that from what you saw that he lived about ten minutes after he was struck, from what you say, do you?

A. Well, I think he lived longer than that; he was still breathing when we carried him up to the office, and that is the last——

Q. Well, how long was that when they carried him up to the office?

A. About fifteen minutes, I suppose, after they taken him
74 out from under the car—or after he was struck, I mean.
Q. When you say carried him up to the office, what office do you mean?
A. That is the yard office there.
Q. Who is in charge, who was at that time in charge of that yard office?
A. I don't know who was the yard master that night, or at that time.
Q. And it is your opinion that he lived about fifteen minutes after he was struck?
A. Why, he was alive at that time; I went away; I went back to my engine; I don't know how long he lived after he was——
Q. What engine did you go back to?
A. Switch engine 9426.
Q. Was that engine pulling the train that struck him?
A. Yes, sir, that is the one that was switching the cars.
Q. And what position did you have on the engine? Engineer of it, were you?
A. I was engineer, yes, sir.
Q. Did you see anything of Mr. Tom Craft around there about that engine when he was struck?
A. No, sir; he wasn't—He was coming up through the yard; I didn't see him at all until after he was struck.
Q. You didn't see him at all until after he was struck?
A. No, sir.
Q. And you were the man that was kicking those cars, as they call it, kicking them?
75 A. Yes, sir.
Q. Down there in those yards?
—. ——.
Q. That was in Argenta, was it?
A. Yes, sir.
Q. About how many tracks are there there in the yards at Argenta?
A. There is twenty-seven.
Q. Twenty-seven tracks?
A. Twenty-seven, I think it is, in that part of the yard.
Q. How long had you known the deceased, Mr. Tom Craft?
A. Well, probably I had seen him before, but I didn't know his name; might have been with him on the road, but I didn't know him till then.
Q. But you had probably seen him before?
A. Probably I had, yes, sir.
Q. Did you have any knowledge at all about his being in any place of danger when those cars were moved there by that engine you were running?
A. No, sir.
Q. Well, why didn't you?
A. Well, that is the way they handle the cars there; and I didn't

know who was back down in the yards. All I had to go by was the signals from the foreman and the crew that I was working with.

Q. What signals did you get that night at this time when this accident occurred?

A. Well, we had been kicking cars in there; and then I got the stop signal.

76 Q. What do you mean by a stop signal?

A. Well, it is a lamp swung across the track.

Q. What do you mean by kicking cars? Tell us that, what do you mean by kicking cars?

A. Well, that is the way they have of switching them there; they give them a hard shove and cut them off and let them go back down the yards in the clear. Generally shove them hard enough to go forty or fifty feet down in the clear; something like that.

Q. On this particular occasion, was there anything done out of the usual way as to working and switching cars there in the yards at Argenta?

Plaintiff Objects; Overruled.

A. No, that—no, sir, working right along like we had been all the time.

Q. How long had that been.

Plaintiff Objects; Overruled.

Q. How long had that been the way that you were handling cars that way in the yards at Argenta?

A. Well, we had been handling them all night that way.

Q. Well, now, do you—how long had you been working in the Argenta yards?

By Mr. JONES, for Plaintiff: If Your Honor please, we object to that testimony for the further reason that it is not cross examination; and, of course, if they want to make him their witness for that purpose it is entirely satisfactory to us. We asked him nothing about the custom or anything of that kind.

By the COURT: Objection sustained on account of it not being cross examination.

Defendant saves exceptions to the Court's ruling.

77 Q. Do you know anything, Mr. Pyles, about Mr. Tom Craft having a lantern and another man in front of him having a lantern at the time this accident occurred? Do you know anything——

A. I don't know that they had lanterns; I suppose though that they did by being out there at night.

Q. Well, did you see anybody, Mr. Craft or anybody else in danger when you were doing your work there in the yards?

A. No, sir, I couldn't have saw him; they was on the opposite side of the train that I was handling.

Q. Well, I believe that is all for the present; they object on account of not being cross examination; I believe that is all for the present.

Redirect examination.

By Mr. JONES:

Q. Now, Mr. Pyles, the string of cars that you were switching, at least a part of them, were on the main, were they?

Defendant objects because it is leading.

Q. Well, there was the string of cars that you were making these cuts out of?

Defendant objects because it is just an indirect way of removing the objection to a leading question.

A. They were on the lead.

Defendant objects.

Q. They were on the lead?

Defendant Objects.

A. Yes, sir.

Defendant Objects.

78 Q. Now then, the switch, in order to get that car on track Six, the switch would have to be turned there between the lead and the switch.

Defendant Objects.

A. Yes, sir.

Defendant Objects.

Q. How did you get them?

By the COURT: How did you get the cars from the main line down to the switch?

Defendant objects.

A. Pull the cars up over the switch and throw this switch, line it up for No. 6; shove the cars down there.

Defendant duly Objected, separately and severally, to each of the foregoing six questions and four answers; and requested the Court to exclude from the jury each of said answers; but the Court overruled each of said objections and refused to exclude any of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Do you know how far *from* the switch that connects track six with the main was from the point of injury?

A. How is that?

Q. How far was it from the switch that connects track six with the main from the point at which you found Mr. Tommy Craft when you went down and found him under the car, the distance?

A. Well, I couldn't say; it must have been fifty feet, or maybe more. I couldn't just say.

Q. You don't know then?
A. No, sir, I don't; I don't know.
Q. How did you have to do a car on the lead or main in order to get it on the track, the side track or the switch? Just explain it to the jury?
79 A. Well, we would pull it up what we call the main line there; that is where all these switches branched off from.
Q. And how far would you carry them, if any distance, beyond the switch on track six?
A. Why, we would carry them up two or three car lengths beyond the switch; maybe a hundred feet.
Q. In order to do what?
A. To give them a kick to go in the clear.
Q. To give them a good start, as you say?
A. Yes, sir, so as they will go down in the clear.
Q. Then the car you kicked in on Track Six would be disconnected from the train, would it?
A. Yes, sir.
Q. And go down how far down the line before it struck the switch?
A. Sometimes two and sometimes three car lengths.
Q. Don't remember how far this one went?
A. No, sir.
Q. The- run down and run into the switch?
A. Yes, sir.
Q. And the distance the car would run after you had given it the kick until it stopped would be how far?

Defendant Objects to the foregoing question account being leading. Objection overruled by the Court and Defendant saves exceptions.

A. I don't quite understand the question.
Q. And then the distance the car would travel from the time you give it a kick to where it would stop would be how far?
80 A. That would just depend on how the car would roll.
By the COURT: Talking about this particular car?
A. That one went down—I suppose it would go three or four car lengths that night, from where everything stopped.
Q. Now, which direction was the head of your engine with reference to the coal car that you kicked in?
A. Which direction was the engine from the coal car?
Q. Yes, sir, the head of the engine?
A. It was north, headed north.
Q. Which way was your headlight shining?
A. There was a head light on both ends.
Q. Of this engine?
A. Yes, sir.
Q. What was next to the engine behind?
A. There was cars.
Q. What kind of cars?
A. Well, I couldn't say whether they was box-cars or coal cars; we had a hold of some cars.

Q. Well, now, what light, if any, did that headlight on the rear of your engine give in the direction in which you shoved the cars?
A. Well, it wouldn't give any, only it shined up against the box-cars, the cars next to the engine.
Q. Did you notice the position that Mr. Tommy Craft was in when you got down there?
A. Nothing, only he was—his feet were on the outside of
81 the rail; he was between the rails.
Q. Where was his face?
A. His face was on the inside of the track.
Q. Up or down?
A. I don't know which it was.
Q. I mean was he lying face down or up?
A. I couldn't say whether he was or not; they was under there taking some rods down when I got there.
Q. You didn't look under there?
A. I couldn't see under there; there was some other men under there.

Recross-examination.

By Mr. S. D. CAMPBELL:

Q. Mr. Pyles, since you have been taken up on examination again by the plaintiff's attorneys, I want to ask you if there is anything unusual as to the switching and handling those cars at the time that Mr. Tommy Craft was struck by this car, from what is habitual in handling cars in the yards at Argenta?

Plaintiff Objects; Overruled.

Q. Well then answer the question; the objection is overruled; tell the jury?
A. Well, that was the—we had been a handling them all night that a way the same as we had the time he got hurt, got hit.
Q. Well, was there anything unusual as to months and years as to working in the yards there at Argenta as to handling cars
82 that way?

Plaintiff Objects; Overruled.

A. Well, that is the—handle them that a way most all the time. No——
Q. Most all the time?
—. ——.
Q. How many tracks did you say there are in the yards at Argenta?
A. Twenty-seven.
Q. Twenty-seven?
A. In that part of the yard, yes, sir.
Q. Now, at Argenta there, the yards, aren't they pretty large and extensive yards?
A. Yes, sir.

Plaintiff objected to foregoing question and answer, which objec-

tion the Court sustained; to which ruling of the Court the defendant at the time duly saved its exceptions.

And defendant offered to prove by said witness that said yards were large and extensive; but the Court refused defendant permission to make such proof; and the defendant at the time duly saved its exceptions to the Court's ruling.

Q. Well, there is a great volume of business done at Argenta there in those yards.

Plaintiff objected to the foregoing question, which objection the court sustained, and defendant at the time duly saved its exceptions to such ruling of the Court.

And Defendant offered to prove by said witness that there is a great volume of business done at the Argenta Yards; but the court refused defendant permission to make such proof; and the defendant at the time duly saved its exceptions to the court's ruling.

83 Q. Where is the principal yard business done as to the traffic, at Little Rock or at Argenta?

Plaintiff objected to the foregoing question, which objection the court sustained; to which ruling of the court the defendant at the time duly saved its exceptions.

By Mr. JONES, for plaintiff: Our objection to this line of inquiry is because it is not proper cross-examination. We have no objection to Mr. Campbell making this witness his witness for the purpose.

Defendant offered to prove by said witness on cross-examination that the greater part of the traffic business is done in the yards at Argenta; that they are much larger than the yards at Little Rock. And further offered to prove the long time, for years, custom of doing this traffic in the yards at Argenta. But the Court refused defendant permission to make such proof; whereupon the defendant at the time duly saved its exceptions to such ruling of the court.

By Mr. JONES, for Plaintiff: We ask the Court to instruct the jury that the statements of counsel for the railroad company as to what he expects to prove is not evidence.

By the COURT: Yes, it is not evidence, Gentlemen.

And to said remarks of the court the defendant at the time duly saved its exceptions.

Q. Now, Mr. Pyles, I believe you stated that you were doing your work in the yards on your engine in the usual way?

A. Yes, sir.

Q. And that you didn't know that Mr. Tom Craft was in any place of danger at all? Didn't know anything about that?

A. No, sir, I didn't know that he was in the yards.

Q. And that you had lights on your engine?

A. Yes, sir.

84 Redirect examination.

By Mr. JONES:

Q. Mr. Pyles, your engine—did you- engine follow down track six on remain on the lead.

A. Remained on the lead.

85 *Testimony of W. E. Hawkins.*

W. E. HAWKINS, witness for plaintiff, being produced and first duly sworn, testified as follows, to-wit:

Direct examination.

By GUSTAVE JONES, Esqr.:

Q. State your name to the jury.
A. W. E. Hawkins.
Q. Where do you live?
A. Argenta, Ark.
Q. What is your business?
A. Locomotive Engineer.
Q. In whose employ?
A. St. Louis, Iron Mountain & Southern.
Q. At what were you engaged Feb. 16, 1913?
A. I was called to go north on the freight train at two a. m.
Q. In what capacity?
A. As an engineer.
Q. Remember the number of the train?
A. Train 66, Engine 66.
Q. What kind of a train was that?
A. Why, it consisted of stock, merchandise.
Q. Freight train?
A. Yes, sir.
Q. Where was it moving?
A. It was standing still.
Q. Where was it moving the freight?
A. Going north.
Q. Well, where to?
A. Hoxie is as far as I went.
86 Q. What was the destination of the freight that was in that train?
A. I don't know.
Q. What was the destination of the train?
A. Hoxie.
Q. That was the end of your division?
A. That is the end of my division.
Q. Do you know where the train was going?
A. No, I don't.
Q. That is the condustor's business?
A. Yes, sir.
Q. On what track was your engine at that time?
A. Track No. 5.
Q. What track was immediately east of five?
A. Six.
Q. How far was your engine from the switch ahead of you?
A. About ten car lengths.
Q. Did you observe a car on track No. 6?

A. I noticed a coal car was being kicked in on track No. 6 by the switch engine working on the lead.

Q. Was any one on the car?

A. No, sir.

Q. Any light on it?

A. No, sir.

Defendant objected to foregoing question and answer; and the Court sustained the objection and instructed the jury that same was incompetent evidence.

Q. Well, who was on the car?

A. No one that I could see.

87 Q. How was it lighted?

A. No light on the car.

Q. Do you know Tommy Craft?

A. No, sir.

Q. You say you were on your engine when the coal car came down?

A. Yes, sir.

Q. Did you leave your engine at any time after that?

A. Yes, sir.

Q. Where did you go?

A. I went to this coal car where this boy was fastened underneath.

Q. How far was that from your engine?

A. About two car lengths; maybe three.

Q. Do you remember that definitely now, Mr. Hawkins?

A. Two or three car-lengths; wasn't very far; just a short distance from my engine.

Q. In what condition or position did you find him?

A. I found him lying on his face across the rail, with his feet on the outside of the rail and his body on the inside of the rails on Track No. 5.

Q. Well, was he lying—how was he lying?

A. Lying with his face down.

Q. Face down?

A. Yes, sir.

Q. You say his feet were on the outside of the rail between tracks five and six.

Defendant objects.

Q. Did you say that or——

Defendant objects because it is leading.

88 By PLAINTIFF'S COUNSEL: Well, I will withdraw that question.

Q. What were the position of his feet with reference to tracks five and six?

A. His feet were lying between track four and five on the outside of the rails; and his body lying on track No. Five.

Q. The same track your train was on?

A. No, on track No. 6 I meant to say.
Q. Then his feet were between what tracks?
A. Between five and six.
Q. And then his head and trunk were where?
A. Between the rails on No. six.
Q. What is between the rails there, Mr. Hawkins, on Track Six?
A. Wasn't anything that I could see.
Q. Did you notice anything on the body of the boy, of Craft?
A. One pair of wheels on the south trucks of this car was standing on the boy's body, had his clothes fastened.
Q. Did you notice anything of a brake rod?
A. There was a connecting rod to the brake rigging across the back of his neck.
Q. Did you see that moved off of his neck?
A. Yes, sir, I helped take it off of him.
Q. Who helped you?
A. Car Inspector; don't know who it was.
Q. What did you have to do to take that off?
A. Just take a pin out from the brake lever underneath.
89 Q. What was Tom doing all that time?
A. Why, he wasn't doing anything.
Q. What expressions was he making?
A. I couldn't tell that he was making any.
Q. Could you tell that he was making any sounds?
A. I could hear him breathing.
Q. Well, what movements did he make?
A. Well, when I took hold of him to pull him out from underneath there, why he would raise his arm; I had a hold of his left arm, and he would pull his arm loose from me and try to pull himself.
Q. Did you go after the pinch bar?
A. No, sir.
Q. Do you know who did?
A. No, sir.
Q. Were you there when the pinch bar came?
A. Yes, sir.
Q. Did you observe whether the pinch bar was used or not?
A. Yes, sir.
Q. Did you see it?
A. Yes, sir.
Q. Tell the jury how they did.

Defendant objects.

A. Well, this pinch bar is a tool used for moving cars by hand; and they put this under the wheel, you know, push it a little at a time; had to move it about twelve inches, eight, ten or twelve inches, something like that, to release his clothes.

Defendant objects.

90 Q. Explain how that is used?

Defendant objects.

A. This bar slipped under the wheel, you know; push down on it; bear down on the bar, you know, that raises the wheel enough to move it.

Defendant objects.

Q. And by pushing down on the pinch bar, what effect does it produce on the wheel of the car, if any?

Defendant Objects.

A. It causes the wheel to move.

Defendant objects.

Q. Did you notice how many times they had to use the pinch bar to get the wheel moved?

Defendant Objects.

A. No, sir.

Defendant objects.

Q. What, if anything, did you have to do with getting him out from under the car?

Defendant Objects.

A. I got hold of his feet, pushed his legs through from the outside, and there was a man underneath there to help pull him out.

Q. To refresh your recollection, I will ask you to note——

(Handing witness paper).

By Mr. CAMPBELL, for Defendant: Defendant objects; not shown to counsel for the opposite party.

Q. What manifestations, if any, did you hear him make?

Defendant Objects.

A. Well, he would move his—try to move himself; and I had a hold of his left arm and he tried to move his—seemed to move his body a little.

91 Defendant duly objected, separately and severally, to each of the foregoing two questions and the foregoing answer; each of which objections the court overruled; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally. And defendant requested the court to exclude said answer from the jury, which the court refused to do, and defendant at the time duly saved its exceptions thereto.

Q. Well, what sounds did you hear?

A. I just heard him groan a little and breathing; that is all the sounds I heard him make.

Q. How did he move his arms and shoulders?

A. Why, he was lying on his face and he would pull his arm up this way (indicating) when we would take a hold of him.

Q. Did you see his face?

A. Yes, sir, I turned him over.

Q. What was the condition of his mouth with reference to cinders, if any?

Defendant objects.

A. Well, his face was dirty.

Defendant Objects.

Q. What was the expression on his face?

Defendant Objects.

A. Well, I never paid particular attention to that.

D'f't Objects.

Q. Now, did you go with him up to the office?

Defendant Objects.

A. No, sir.

Defendant duly objected, separately and severally, to each of the foregoing three questions and answers; and requested the court to exclude from the jury each of said answers; but the court overruled each of said objections and refused to exclude any of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. You went from there to your engine, did you?

92 A. Yes, sir.

Q. And you knew nothing more about it?

A. No, sir.

Q. Did you notice any blood about there, Mr. Hawkins?

A. No, sir, I never noticed.

Q. On which side—Well, how did you go down to where he was, between what tracks?

A. Between five and six.

Q. What, if anything, in the place between tracks five and six did you observe?

Defendant objects.

A. I noticed some rubbish, some pins, and a knuckle or two, two or three knuckles in one pile there.

Defendant duly objected, separately, to foregoing question and answer; and requested the court to exclude said answer from the jury; but the court overruled each of said objections and refused to exclude said answer; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Where was that pile with reference to where you found Mr. Tommy Craft under the car?

A. It was about a car length from him, I guess.

Q. Do you think it was that far?

A. Oh, I don't know; something like that; 15 or 20, maybe 25 feet; something like that.

Q. Well, now, is that just a—do you think it would be that far from him?

A. Well, I never paid particular attention to it; it wasn't very far from him.

Q. Mr. Hawkins, was it light or dark there?

A. It was dark, about two o'clock in the morning.

93 Q. Dark?

A. Yes, sir.

Cross-examination.

By S. D. CAMPBELL, Esqr.:

Q. Mr. Hawkins, that rubbish you spoke about, you say that was just a little bit of rubbish there?

A. Well, it was some two or three pins; I never paid particular attention; there was some knuckles and some pins a lying there.

Q. These pins, what were they, coupling pins?

A. Yes, sir.

Q. Just something like that lying on the ground?

A. Yes, sir.

Q. And these knuckles, what are they? Describe that to the jury; want the jury to understand what you mean by this rubbish; what were the knuckles?

A. It is a knuckle fixed under this pin; the pin goes through the top here (indicating) and connects with the draw bar to make the coupling.

Q. How large are they?

A. They weigh all the way from—I don't know just how much they would weigh.

Q. Want you to tell the jury the size of them.

A. Well, they are not hardly as large as one of those spittoons there (indicating).

Q. Those knuckles are not hardly as large as one of the spittoons you see down there?

94 A. I don't think so.

Q. And those pins and those knuckles, not as large as those spittoons, was all the rubbish you saw around there?

A. That is all, I think.

Redirect examination.

By Mr. JONES:

Q. How many knuckles did you see there?

A. Must have been three or four; I never counted them.

Q. Was there a shank to those knuckles?

A. You mean stacked up?

Q. A shank, I say?

A. No.

Q. No shank to them; knuckle just cut off her?

A. Oh, yes, they was all lying there on the ground together.

Q. Don't the knuckles have a shank?

A. Yes, they have a piece about that long, I guess; kind o' in that shape.
Q. What is that on to?
A. It is on to the same thing; it is all together, makes the knuckle.
Q. How much would it weigh?
A. I don't know, sir, how much it would weigh.
Q. Well, they are arrangements that you have to connect your cars with, aren't they?
A. Yes, sir.
95 Q. Are they light or heavy?
A. Well, they have got pretty good weight to them, I don't know just how much they would weigh, though.
Q. Now, you say one of them would be about as big as a spittoon?
A. Well, something—well, wouldn't be as wide as that, of course, but the bulk of it.
Q. About how long up and down this way (indicating)?
A. About six or eight inches, I think.
Q. About eight inch face, ain't they?
A. About eight inch face, I think.
Q. And back this way, how are they?
A. Well, I don't know just how far back that goes.
Q. How many were there there?
A. Three or four; I never counted them.
Q. You say they are used to connect the cars; are they used to pull by?
A. Yes, sir.
Q. What would be the weight of an ordinary loaded car?

Def't Objects.

Recross-examination.

By Mr. S. D. CAMPBELL:

Q. About these knuckles, they are just about the size, you say, of the spittoon there; and this shank they have spoken about, what is that shank that Mr. Jones is talking about, the shank?
A. Well, it goes back in underneath the draw bar there and there is a ledge or something goes down in there that catches this
96 that locks the knuckle.
Q. How large are they?
A. You mean the shank?
Q. Yes, the shank that Mr. Jones was talking about?
A. It is not very wide; about an inch and a half or two inches; might be a little over; I never did——
Q. About how many inches?
A. Something about two inches or two and a half inches.
Q. The shank to the knuckles?
A. It tapers to the small end; little wider at the back end of it; I don't know just the size of it.
Q. You said there was three or four; were they piled up on each other or not?
A. No, wasn't stacked up; just lying there in a bunch together.

Q. Just lying there in a bunch together?
A. Yes, sir.
Q. Right on the ground?
A. Right on the ground.
Q. Not sufficient size in any way to obstruct anybody's view, was it?
A. Not necessarily; I saw them; I had my torch in my hand when I went back where he was at and I saw them and stepped over them.
Q. And these knuckles, three or four knuckles with the shanks to them, were just lying on the ground there?
A. Yes, sir.
97 Q. And that is all you saw?

Defendant renews its motion to exclude the evidence of this witness relative to the knuckles; whereupon the court instructed the jury as follows:

By the COURT: Gentlemen, the testimony given by the witness Hawkins with reference to certain rubbish, which he describes as knuckles, lying between tracks five and six is not competent evidence and you needn't consider it.

98 *Testimony of L. H. Tanner.*

L. H. TANNER, witness for the plaintiff, being produced and first duly sworn, testified as follows, to-wit:

Direct examination.

By GUSTAVE JONES, Esqr.:

Q. What is your name?
A. Tanner, L. H.
Q. Where do you live, Mr. Tanner?
A. Argenta.
Q. What is your business?
A. I am at the present time yard master.
Q. At what were you engaged on the night of Feb. 16, 1913?
A. I was engine foreman.
Q. Of what engine?
A. Of what they call the "hole" engine.
Q. Do you remember the number?
A. I believe it is 9426, as well as I remember.
Q. Where were you working at that time?
A. I was working on what was called the "hole" lead; it is a lead engine.
Q. What were your duties?
A. My duty was to handle all—handle the cars on that lead and as many as possible.
Q. Did you handle any coal cars that night?
A. Yes, sir.

Q. Did you kick a car of coal, or coal car of cinders, or car of coal, on track No. six?
A. How is that?
Q. I say, did you—did you have a car of, have a coal car
99 kicked on track No. six?
A. Yes, sir.
Q. And did you kick another one on No. six?
A. Eight.
Q. Well, then, after you kicked that one on No. Eight, did you start to kick another one on No. Six?
A. I did.
Q. Who stopped you?
A. Mr. Speer.
Q. Did you know Tom Craft?
A. I did.
Q. How long after Mr. Speer stopped you from putting another car on Track No. Six was it that you saw Mr. Craft?
A. Only a few seconds; as quick as I could get down there.
Q. Where was you when Conductor Speer told you that?
A. I was at No. Six switch, prepared to turn it.
Q. And you was on the lead track?
A. I was on the lead, yes, sir.
Q. Did you go down to where Tom Craft was?
A. I did.
Q. What distance did you have to travel and how did you go?
A. Had to go about three car lengths, probably about four car lengths; and I went in a run.
Q. What path did you travel?
A. Went right down No. Six, between Six and Seven until I got to the end of the car.
Q. Yes, at the end of the car where he was?
A. Yes, sir.
100 Q. Did you see him?
A. I did.
Q. What was his position when you saw him?
A. He was lying on his face.
Q. Did you give him the pinch bar?
A. I did.
Q. From where you found him to where you got the pinch bar, how far did you have to travel?
A. About a block.
Q. Then you brought the pinch bar back?

Defendant Objects.

A. Yes.

Defendant Objects

Q. Who brought the pinch bar back?

Defendant Objects.

A. I did.

Defendant Objects.

Q. What, if anything, then, did you do with the pinch bar?

Defendant Objects.

A. I used it to release his body.

Defendant Objects.

Q. Wish you would explain to the jury just how you did?

Defendant Objects.

A. Well, I used the bar to pinch the car north about three inches, as one pair of wheels had had his body foul, which I could not couple into with the engine without running the car over him.

Defendant Objects.

Q. And why did you move the car?

Defendant Objects.

A. To release his body.

Defendant Objects.

Q. To get him out of there.

Defendant objects.

A. Yes, sir, so we could get him out.

101 Defendant duly objected, separately and severally, to each of the foregoing six questions and six answers; each of which objections the court overruled; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally. And defendant requested the court to exclude from the jury each of said answers; but the court refused to exclude any of said answers; and the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Then what did you do?

Defendant Objects.

A. What did I do?

Defendant Objects.

Q. If anything, yes.

Defendant Objects.

A. I left until he was taken out from under the car and placed on the cot.

Defendant Objects.

Q. Then did you go with him to the office?

Defendant Objects.

A. I helped to carry him to the office.

Defendant Objects.

Q. How was he carried, Mr.——

Defendant Objects.

A. On a cot.

Defendant Objects.

Q. What, if any, manifestations or signs of pain did you see that he gave?

Defendant Objects.

A. Well, I heard him groan once or twice after I got to the car; and only thing I could see was—I say I heard him groan once or twice; and when he was taken out from under the car and put on a cot, I could see his muscles move; that is the only thing; I couldn't speak to him; I tried to speak to him.

Defendant Objects.

Q. Did you see his face?

Defendant Objects.

102 A. No, sir, I never looked at his face; I looked at his face once under the car, but I didn't look at it after he was on——

Defendant Objects.

Q. How was the expression on it?

Defendant Objects.

A. I couldn't say, you know, because it was dark and nothing but a lantern.

Defendant duly Objected, separately and severally, to each of the foregoing seven questions and seven answers; and requested the court to exclude each of said answers; but the court overruled each of said objections and refused to exclude any of said answers, whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Now, when you got to the office, did you leave him there?
A. Yes, sir.
Q. He was still alive, was he?
A. Well, I don't know; I could tell he was still breathing.
Q. Well, he was breathing, was he?
A. Yes, sir; that is, what I would call breathing, yes, sir.
Q. Where did you go?
A. I went back to my work.
Q. Did you see the ambulance come?

Defendant Objects.

A. I did.

Defendant Objects.

Q. How long was it after you got him to the office?

Defendant Objects.

A. I should judge about fifteen minutes.

Defendant Objects.

Q. Well, of course, that is just—Well, how long was it from the time you went down there to help get him out until you got him to the office?

Defendant Objects.

103 A. Why, I should judge about from between ten and fifteen minutes.

Defendant duly objected, separately and severally, to each of the foregoing three questions and three answers; and requested the court to exclude from the jury each of said answers; but the court overruled each of said objections and refused to exclude any of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Did you see the ambulance leave the office?
A. I did.
Q. Do you know who was in it?
A. I do not.
Q. Did you know at the time?
A. No, sir, I don't, didn't.
Q. Do you know whether anybody went in the ambulance with him or not?

Defendant Objects.

A. No, sir, I don't.

Defendant Objects.

Q. Did you know the driver?

Defendant Objects.

A. No, sir, I didn't.

Defendant Objects.

Q. You say you saw his muscles jerking; tell the jury how they jerked?

Defendant Objects.

A. Why, the only thing, seems like I could see him just kind o'jerk, you know; just like this (indicating).

Defendant Objects.

Q. You made a statement in this case; to refresh your recollection, Mr. Tanner, I will show you——

104 By Mr. CAMPBELL, for Defendant: I object to that because he is trying to impeach his own witness. I want it shown here that attorney for the plaintiff shows the witness a paper that is not shown to the attorney for the other side.

Objection overruled; exceptions saved.

Q. Now, tell the jury how his muscles jerked?

Defendant Objected.

A. Why, how was, of course, I don't know; I can't do it exactly;

but though I could just see, you could just see his muscles move, that was all, just quiver; his shoulder, possibly his shoulders and body, kind o'quiver; that was all; kind o'jerk.

Defendant Objects.

Q. Well, did you ever see anybody that was in pain?

Defendant Objects.

A. No, sir, not—of course, I have saw people in pain; I suppose was in pain; but I never witnessed nothing of that kind.

Defendant Objects.

Q. Well, how about him?

Defendant Objects.

A. Well, I couldn't say, Brother.

Defendant duly objected, separately and severally, to each of the foregoing seven questions and six answers; and requested the court to exclude each of said answers from the jury; but the court overruled each of said objections and refused to exclude any of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Mr. Tanner, did you notice any blood on the track or the rails there?

A. Yes, sir.

Q. Where was the first blood that you observed with reference to where the car had stopped that Mr. Craft was under?

105 A. Well, I should judge about eight or ten feet, or something another like that; five or six; something another; I don't know exactly the distance, but it wasn't a car length.

Q. Where was the first blood with reference—Did you see a pile of knuckles and pins in the path between track five and six?

Defendant Objects.

A. Why, they was some knuckles and three or four knuckle pins laying there between five and six.

Defendant duly objected, separately, to foregoing question and answer; and requested the court to exclude said answer from the jury; but the court overruled each of said objections and refused to exclude said answer; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Did you obe*r*ve that?

A. Yes, sir.

Q. With reference to those articles, where was the first blood north of the car or north of where you found his body, if any?

A. It was south.

Q. Sir?

A. It was south.

Q. The body was south; that is, Tom's body was lying south of where you found the first blood?

A. Yes, sir.
Q. How far was that first blood from the pile of knuckles and pins?
A. I should judge about three or four feet.
106 Q. Did you observe along the rail anything?

Defendant objects to foregoing question, which objection the court overruled and defendant at the time duly excepted.

A. No, sir.
Q. What else did you notice there besides knuckles, if anything?
A. Nothing only some knuckle pins; I don't know exactly how many; I never paid much attention to it.
Q. What is a brake shoe key?
A. Brake shoe key is a key that holds the brake shoe on to the brake beam; little long piece of iron about as wide as your finger and runs to a point, the thickness of it is about a quarter of an inch or little more.
Q. Were any of them there?
A. There was some brake shoe keys there, yes, sir.
Q. Now, you say you noticed blood north of where the car had stopped, did you?

Defendant objects; repetition and immaterial.
By the COURT: Perhaps it is leading. Go ahead.

A. Yes, sir.

Defendant duly objected, separately, to foregoing question and answer; and requested the court to exclude said answer from the jury; but the court overruled each of said objections and refused to exclude said answer; whereupon the defendant at the time duly saved its exceptions thereto, separately.

Q. State whether or not he had been slid by the car after it struck him?

Defendant Objects. Sustained.

By Mr. CAMPBELL, for Defendant: I ask the Court in addition to that, to reprimand counsel for asking such a question as that.
107 By the COURT: Well, it looks like counsel would know that wouldn't be proper.

Q. If you know?

Defendant Objects. Sustained.

Q. Could you tell from your observations—did you make any observations around there on the track or on the rails?
A. No, sir, until after some of the crew says——
Q. At any time?
A. No, sir.
Q. Well, you said until some of the crew——
A. I said until some of the crew had told me, says——
Q. You can't say.

A. Found blood there, and then I went and looked and saw blood there; that was all; then found that little pile——

Q. Did that blood go from say five feet north of where the car stopped or even——

A. I should judge it went five, six or seven foot, something like that, north of where the car stopped.

Q. North of where the car stopped.

A. Yes, sir.

Q. You saw blood, as I understand, about five feet north of where the car stopped.

Defendant Objects.

Q. I will change the form of it; did you observe any blood on the rails or track in the neighborhood of where Tom Craft lay?

Defendant Objects.

A. Yes, sir.

Defendant duly objected, separately, to foregoing question and answer; and requested the court to exclude said answer from the jury; but the court overruled each of said objections and refused to exclude said answer; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

108 Q. What was around the body of Tom Craft as he lay down there between the cars, other than the ground?

A. What was around his body?

Q. Yes?

A. Nothing that I saw.

Q. Have any clothes on him?

A. Oh, he had his clothes.

Q. Did you observe any blood on the clothes?

A. No, sir, I didn't; I never noticed any.

Q. Did you notice any blood on the ground there?

A. I did.

Q. Now then, from that point, was that blood, where was that blood with reference to the body?

A. Well, the biggest part of it was right at the body.

Q. Then did it extend in any direction from the body?

A. I told you about a few feet north of it I saw a little blood on the rail.

Q. Few feet north of there?

A. Yes, sir.

By the COURT: Did he say "two" or "few"?

A. I said a few.

Q. About how many?

A. That is hard for me to say. I never paid much attention to it. I just saw it; I know it was north; I should judge five, six or seven foot; maybe eight; I don't know; never paid particular attention to it.

Q. Now then, how far was the first blood north—the north part of the blood, from the pile of knuckles?

A. It was south; south of the knuckles.

109 Q. It was south of the knuckles?

A. Yes, sir.

Q. How far south?

A. Well, that is something else—I don't know exactly; I will say three or four, may be possibly five feet, somewhere in the neighborhood of that distance.

Q. Mr. Tanner, after you left the office, after taking Mr. Craft there, when did you next see him?

A. I didn't see him.

Q. Never saw him after that?

A. No, sir.

Q. Didn't you see him the next—didn't never see him at all?

A. No, sir.

Q. Did you observe how he was—what if any effect had been produced by the car, the wheel running over him?

Defendant duly objected to foregoing question, which objection the court overruled, and defendant duly saved its exceptions.

A. How is that now?

Q. (Stenographer repeats question.)

A. Well, did I observe if any what—what was the question?

Q. (Stenographer repeats question.)

A. Effect which way? I don't clearly get your question.

Q. Did you notice whether it——

Defendant objects.

A. Whether the wheel went over him?

Defendant objects.

Q. Whether his body had been injured in any way?

Defendant objects.

A. Yes, sir, I did.

110 Defendant duly objected, separately and severally, to each of the foregoing two questions and two answers; and requested the court to exclude each of said answers; but the court overruled each of said objections and refused to exclude either of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Did you notice that?

A. I did.

Q. How was it injured?

A. Car wheel run across his body.

Q. What effect did that produce on his body?

A. I didn't observe any.

Q. You know whether it hurt him?

A. I suppose it hurt him; don't know whether it cut him clear in two or not.

Q. Don't know whether it broke any bones?

A. Yes, sir, I could tell it broke bones.

Q. Which bones?
A. Through here (indicating); because his legs were limber; I never saw his flesh only where it cut through; I could see part of his flesh; but those bones are bound to have been broken, that heaving car going over him.
Q. Did you have hold of him?
A. Once.
Q. What part of the body did you have hold of?
A. His shoulders; I turned over his face and spoke to him; tried to speak to him.
Q. Were you under the car?
A. I was.
111 Q. Now, you never saw him after you left the office?
A. No, sir.
Q. Do you know whether there was a coroner's inquest or not?
A. Yes, sir.
Q. Were you there?
A. I was.
Q. Was Tom Craft's body there?

Defendant duly objected to foregoing question; which objection the court overruled; and defendant duly saved its exceptions.

A. I don't know; I didn't see it.
Q. You didn't go with the ambulance?
A. No, sir.
Q. Do you know who did?
A. No, sir, I do not.
Q. Who was the foreman of the yard at that time?
A. Why, fellow by the name of Layhe was yard master.
Q. Do you know where he is?
A. I rather think he is in Ft. Worth, Texas.
Q. Do you know where he is?
A. No, sir, I don't.

No cross-examination.

112 *Testimony of J. T. Craft.*

J. T. CRAFT, the Plaintiff, being produced and first duly sworn, testified in his own behalf as follows, to-wit:

Direct examination.

By GUSTAVE JONES, Esqr.:

Q. State your name to the jury?
A. J. T. Craft.
Q. Did you know Tom Craft in his lifetime?
A. Yes, sir.
Q. What if any relation was he to you?
A. He was my son.

Q. Where is he?
A. Dead.
Q. When did he die?
A. 16th of February, 1913.
Q. Were there letters of administration issued upon his estate, if you know?
A. Yes, sir.
Q. Have you the letters?
A. I have.
Q. Let me have them.

By PLAINTIFF'S COUNSEL: These are the letters of administration, the original letters, which we want to introduce in evidence.

Defendant objected to the introduction of said letters on the ground that same should be followed up with an order of the Probate Court of Pulaski County; but the Court overruled said objection and permitted said letters to be introduced in evidence. (Same being attached hereto as Exhibit "A" to testimony of Pltf.) Whereupon the defendant at the time duly saved its exceptions thereto.

Q. Mr. Craft, you say your son died on the 16th of February, 1913?
113 A. Yes, sir.
Q. When did you first learn of it?
A. Sunday morning; I guess about nine o'clock, eight or nine.
Q. Where were you?
A. In Helena.
Q. What did you do?
A. I was foreman there, section foreman.
Q. What did you do when you heard of it?
A. What did I do?
Q. Yes.
A. Why, I came—came home.
Q. Well, did you see the body of your son?
A. Yes, sir.
Q. When did you see him?
A. Sunday night, I guess it was Sunday night; after — came up; he was killed about two o'clock on Sunday morning; 2:10.
Q. Whereabouts?
A. In the yards at Argenta. I come around by the way of Kensett; and they sent the body up, I think, on——

Defendant Objects.

Q. Where did you see his remains?

Defendant Objects.

A. At Mr. Stanley's, J. R. Stanley's at Diaz.

Defendant duly objected, separately, to foregoing question and answer; and requested the court to exclude said answer from the jury; but the court overruled each of said objections and refused to

exclude said answer; whereupon the defendant at the time duly saved its exceptions thereto, separately.

Q. What time was that?
114 A. What time?
Q. Yes?
A. What time in the night?
Q. Yes, or day? What day was it, and what time was it?
A. I say it was about eleven o'clock, something like that, Sunday night, Feb. 16, 1913.
Q. February what?
A. February 16th.
Q. Did you look at him?
A. Yes, sir.
Q. Did you notice any injuries on his body?

Defendant duly objected to foregoing question, which objection the court overruled, and defendant duly saved its exceptions.

Q. You say you didn't?
A. He was in the coffin.
Q. How old was he, Mr. Craft?
A. I think he was, he was twenty-two years old the 23rd of December.
By the COURT: 23rd of What?
A. 23rd, I think, of December, 1913.
Q. 1913?
A. Ninenteen and—born in 1889.
Q. Born in 1889?
A. Yes, sir, 1889.
Q. How old are you, Mr. Craft?
A. I am fifty-three.
Q. What year were you born in?
115 A. 1861.
Q. What month?
A. April.
Q. What was your son engaged in?
A. He was braking for the Iron Mountain.
Q. Do you know what he was earning?

By Mr. CAMPBELL, for Defendant: Defendant objects, first, because it would be bound to be hearsay; and second, because it would be transactions of the administrator, on the theory of this plaintiff, with the deceased; bound to be one or the other; and I am objecting for both reasons.
Objections overruled: Exceptions saved.

A. About what he was earning at the time he was killed?

Defendant Objects.

Q. Yes.

Defendant Objects.

A. About ninety, about ninety or ninety-five; sometimes a hundred and ten.

Defendant Objects.

By the COURT: You mean Dollars, do you, Mr. Craft?

Defendant Objects.

A. Yes, sir, about that many dollars a month.

Defendant duly objected, separately and severally, to each of the foregoing three questions and three answers; and requested the court to exclude each of said answers from the jury; but the court overruled each of said objections and refused to exclude any of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. What did he do with his earnings, if you know?

Defendant Objects.

A. What he didn't use for himself, why he gave to me.

Defendant Objects.

Q. Did he or did he not contribute anything to you out of his earnings?

Defendant Objects.

A. Yes, sir.

Defendant Objects.

116 Q. In what amount?

Defendant Objects.

A. Well, at the time, about thirty-five, forty; at the time of his death thirty-five or forty dollars a month.

Defendant duly objected, separately and severally, to each of the foregoing three questions and answers; and requested the court to exclude each of said answers from the jury; but the court overruled each of said objections and refused to exclude any of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. What was his marital condition? Was he single or married?

A. He was single.

Q. Had he ever been married?

A. No, sir.

Q. What was your son's, what were his habits, Mr. —— ——

Defendant Objects.

A. Good, sir.

Defendant Objects.

Q. Well, as regards sobriety or industry or drunkenness or idleness?

Defendant Objects.

A. No, sir; perfectly.

Defendant duly objected, separately and severally, to each of the foregoing two questions and two answers; each of which objections the court overruled; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally. And defendant requested the court to exclude each of said answers from the jury; but the court refused to exclude either of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

A. He was a model young man, sir.

By PLAINTIFF'S COUNSEL: That is a conclusion, I will ask you to state whether or not he was sober or not. I will ask the court to instruct the jury that is incompetent evidence.

117 By the COURT: That wouldn't be competent; that might be what he would think about it; somebody else might think differently; so it is only the conclusion of the witness and not evidence in this case.

Q. Was he idle and dissolute, or otherwise?

Defendant Objects.

A. He was not.

Defendant duly objected, separately, to foregoing question and answer, and requested the court to exclude said answer; but the court overruled each of said objections and refused to exclude said answer; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Well, what was his disposition?

Defendant Objects: Overruled; exceptions saved.

Q. If you know it?

Defendant Objects: Overruled: exceptions saved.

By the COURT: State his character and disposition?

Defendant Objects: Overruled: exceptions saved.

A. Good.

Q. I am not asking you for your conclusions, Mr. Craft; I am asking you if you had occasion to observe his habits and disposition; have you?

A. Why, certainly.

Q. What were those habits?

Defendant Objects: Overruled: exceptions saved.

A. His habits, I say his habits were beyond reproach.

Q. That is what you think about it?

A. That is what I t-ink, yes, sir.

By PLAINTIFF'S COUNSEL: We ask the court to instruct the jury to exclude that.

By the COURT: He might be right and might not be right; that answer perhaps wouldn't be competent for you (jury).

Defendant duly objected to foregoing question and answer and requested the court to instruct the jury that same were not competent.

118 By Mr. CAMPBELL, for Defendant: We ask the court to tell the jury absolutely it is not competent evidence and to disregard it.

By the COURT: Yes, that is not competent evidence.

Q. Do you know, Mr. Craft, whether or not he used intoxicating liquors?

Defendant Objects.

A. Why, not to excess; if he did, it was very little, sir.

Defendant Objects.

Q. Very little to excess.

Defendant Objects.

A. Very little, I say.

Defendant duly objected, separately and severally, to each of the foregoing two questions and two answers; and requested the court to exclude each of said answers; but the court overruled each of said objections and refused to exclude either of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Was he idle?

A. No, sir.

Defendant duly objected to foregoing question and answer and requested the court to instruct the jury that same were not competent.

By the COURT: I have told the jury that wasn't competent.

Q. Did you know what kind of a—what your son's habits were with reference to industry?

Defendant Objects.

A. Why, he was industrious; always working; sober.

Defendant duly objected, separately, to foregoing question and answer; and requested the court to instruct the jury that same was incompetent testimony and to exclude said answer from the jury; but the court overruled each of said objections and refused to exclude said answer; whereupon the defendant at the time duly saved its exceptions, separately and severally.

Q. What if any attention did he ever give you, Mr. Craft?

Defendant Objects to foregoing question: sustained.

119 Q. What services did he ever render you?

Defendant Objects.

Q. What were his intentions, if you know, with reference to any further contributions to you, Mr. Craft?

Defendant Objects.

Q. What promises or representations did he make to you with reference to the matter of contributions to you?

Dft. Objects.

By the COURT: Let that question pass for the present.

Q. Mr. Craft, what had been the health of your son prior to this injury?

A. Good.

Q. What do you mean by good?

A. Why, he wasn't sick any that I know of; and never knew him to be sick but very little.

Q. Was he a weakling?

Defendant Objects; sustained.

Q. Was he vigorous and able-bodied or otherwise.

Defendant Objects.

A. Why, he wasn't a robust boy, but was healthy and had been since he had got to be, to manhood, or near it, and physically able to labor.

Defendant duly objected, separately, to foregoing question and answer; and requested the court to exclude from the jury said answer; but the court overruled each of said objections and refused to exclude said answer; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. How long had he been working up to that time?

A. How long had he been working for the company?

Q. Or at anything?

A. Oh, he had been working all of his life.

Q. Now, let's see.

120 A. Ever since he was large enough; say ten or twelve years old.

Cross-examination.

By S. D. CAMPBELL, Esqr.

Q. Mr. Craft, where do you reside?

A. At Diaz, Arks.

Q. How long have you resided at Diaz?

A. Last time, about four months.

Q. I am talking about all the time, from now back. About four months, you say?

A. The last time I have been there, moved there, yes, sir.

Q. About four months?

A. Yes, sir.

Q. Now, this past four months, where have you been residing?

A. At Diaz.

Q. Now, back of the past four months, where did you reside and live?

A. Why, I was—I have been around Diaz here, and Newport together, most continuously for the past fifteen or sixteen years, off and on. Oftener here, though; longer here than anywhere else.

Q. Why do fix it the last four months you have resided at Diaz? Have you any family residing at Diaz?

A. Yes, sir.

Q. Now, during the last four months that you have mentioned, you have been in Newport more than you have in Diaz, haven't you?

A. No, sir.

121 Q. Haven't?

A. No, sir.

Q. Now, just going back behind that four months that you have been living at Diaz, haven't you been living at Newport a considerable part of the time?

A. No.

Q. Haven't you been in business at Newport?

A. Not in the last four months, no, sir.

Q. Not in the last four months?

A. No, sir. I have been in business at Newport.

Q. Well now how long has it been since you have been in business at Newport?

A. I believe May, 1912, I believe.

Q. How long were you in business in Newport in 1912, the year 1912?

A. Well, I was in business here part of 1911 and '12.

Q. 1911 and '12?

A. I think, if my memory serves me right.

Q. What was your business here 1911 and '12?

A. Part of the time I run a cold drink stand.

Q. Whereabouts?

A. It is part of the room now where Best's pool hall is.

Q. Ran a cold drink stand there?

A. Yes, sir.

Q. In 1911 and 1912?

A. A part; I say; a part of that; I don't just—haven't any record of it.

Q. It was in the place down there in that Best Hotel where the spectacle man has his place of business, wasn't it?

122 A. No.

Q. Just the next door to it?

A. No.

Q. Well, where was it with reference to the Best Hotel?

A. In a part of the room, as I told you, where the pool hall is now.

Q. Well, where is that spectacle man's place of business with reference to that?

A. Well, it is just immediately south.

Q. Just south of it?

A. Yes, sir.

Q. And in 1911 and '12 you were engaged in business there running a cold drink stand?

A. Part of the time, I say; part of the time.

Q. Well, how much of the time?

A. Well, I couldn't say; I went in the cold drinks there I think about June, sometime in June, 1911, I think; sold out probably in December.

Q. In December, 1911, or 1912?

A. I think it was December, 1911, as well as I remember.

Q. December, 1911; whom did you sell to?

A. I don't know what the gentleman's name is; he didn't keep it very long.

Q. Do you mean to say, Mr. Craft, you sold out a business that you were conducting there and don't know the name of the man to whom you sold your business?

A. That is exactly what I am telling you.

Q. Don't know who you sold your business to?

A. No, I don't.

123 Q. Don't know who it was?

A. No, don't know his name; probably would recall his name if I heard it called; but he was a stranger come in here, and I don't know.

Q. How long had you been running your business before you sold out to him?

A. I think sometime about the first of June until sometime in December, 1911.

Q. June, July, August, September, October and November and December?

A. Yes.

Q. Those months?

A. Yes.

Q. And yet you can't tell the jury who it was you sold your business out to?

A. No; Gentlemen, I can't recall his name.

Q. What kind of a looking man was he, describe him?

A. Why, he was an old gentleman, came in here with a boy, him and a boy; and he didn't keep the place very long; and he sold it, I think, to some lady here, and left and went down below Wynne somewhere.

Q. And all those months, you can't tell the name of that man you sold your business out to?

A. No, sir.

Q. Can't tell the jury?

A. I don't know his name, Gentlemen.

Q. We just want to get at the facts in the matter, you can't give his name?

124 A. No.

Q. Now, where were you located, Mr. Craft, before you run this business here for all those months, before you sold out, right

around over there at the place that has just been mentioned? Where were you located before that?

A. Before I went in there?

Q. Yes, sir.

A. I was in business at Diaz, I believe, in 1909; probably part of 1909 and '10, if my memory serves me right.

Q. What business?

A. In the mercantile business; grocery business.

Q. In the grocery business at Diaz?

A. Yes, sir.

Q. For what period of time?

A. I declare, it was along in 1909, I think; part of 1909 and '10.

Q. In the grocery business for yourself?

A. Yes, sir.

Q. In your business you were not—you were just in the business for yourself, weren't you?

A. Well, yes, sir.

Q. How old did you say you were, Mr. Craft? Were, and how old are you now?

A. About fifty-three.

Q. And you have been a pretty strong, vigorous, active man in business yourself, haven't you, in your lifetime?

A. Well, I have not been as strong a man as I look to be.

Q. You haven't?

A. No, sir.

125 Q. Not as strong a man as you look to be?

A. No, sir.

Q. You have no family?

A. Yes, sir, I have a family.

Q. How much?

A. I have a wife and daughter.

Q. And you have been supporting them, haven't you?

A. No, sir, I haven't supported my daughter since, oh, about eight years, I guess; she has been married.

Q. You haven't supported her; she has been married about eight years; her husband supports her?

A. Yes, sir.

Q. And, of course, you naturally expected her husband to support your daughter, didn't you, Mr. Craft?

A. That was the agreement with him.

Q. That is what you naturally expected?

A. Yes, sir.

Q. And you were in business at Diaz for yourself part of the time and in business at Newport, as has been described here; and then you have been in business at what other places?

A. I was, before I came back here the last time, I was at Helena; I went to Helena in January, 1912, I believe it was January, 1912, and stayed there till June, first of June, I believe, 1913.

Q. You were at Helena then from about the first of June——

A. No, from about the first of January.

Q. Well, first of January, 1912, was it?
126 A. Yes, sir.
Q. To what time in June?
A. I think it was somewhere about the first of June, probably.
Q. 1912 or 1913?
A. 1913; I mean January, 1913; did I say 1912? If I did, I am mistaken.
Q. Well, fix that now; you can refresh your memory; now, you were at Helena from what date to what date?
A. From about the 5th of January, 1913, to somewhere about the first of June, 1913.
Q. January to June, 1913?
A. Yes, sir.
Q. What were you doing down there?
A. Section foreman.
Q. Section foreman?
A. Yes, sir.
Q. And that required and you did some active work, didn't you?
A. No, I didn't do any physical labor, no, sir.
Q. Mr. Craft, you don't claim to be any invalid, do you?
A. No, sir, not an invalid.
Q. You are an active man?
A. Pretty active.
Q. Fifty-three years old?
A. Yes, sir.
Q. And weigh about how much?
A. Two hundred and fifty.
127 Q. And are making an active canvass for office, too, aren't you?
A. Yes, sir.
Q. For corponer?
A. For corponer.
Q. Of this county? And making an active canvass for that.
—. ——.
Q. Well, what were you doing before you went down to Helena, Mr. Craft?
A. I was running an extra gang on the Cotton Belt from July, maybe June, or July, I think, 1912, to January 5th, 1913; I say June or July; I don't know. I have got the records at home, but didn't think I would need them.
Q. About how long was it on the Cotton Belt?
A. Well, somewhere between six and seven months.
Q. Six or seven months.
A. Yes, sir.
Q. And then before that work on the Cotton Belt, what did you do?
A. Well, I think that is about the time I sold out here; not the cold drink stand, though.
Q. Well, go back of that, before you sold out the cold drink stand, and what did you do before that?
A. I was in the restaurant business.

Q. Whereabouts?
A. Right at Best's Cafe.
Q. At Best's Cafe over here?
128 A. Yes, sir.
Q. That is the old Planter's House, isn't it?
A. Yes, sir.
Q. What do they call it now?
A. Best's Cafe.
Q. And how long did you engage in that work?
A. Well, I declare, I couldn't tell you; probably some four or five months; when I sold out there; now, that is when I went over to the Cotton Belt.
Q. When you went over to the Cotton Belt?
A. Yes.
Q. Well, before you engaged in that restaurant business, what was your work?
A. I don't know that I did anything for two or three months, maybe; couple of months; from the time I sold out the cold drink stand until I went into the restaurant business.
Q. Those two or three months, now, you don't know that you did anything?
A. No, don't know that I did.
Q. Just before the two or three months you didn't do anything, what did you do, Mr. Craft?
A. I was in the cold drink business.
Q. Whereabouts?
A. Best's; under the old Planters.
Q. Before that, what did you do?
A. I was at Diaz in business a year or so.
Q. And before at Diaz, what did you do?
A. Section foreman.
129 Q. Where?
A. On the Iron Mountain.
Q. For how long?
A. Why, I guess probably fifteen or eighteen years.
Q. Section foreman for the Iron Mountain?
A. Section foreman, extra gang, and road master.
Q. And then before that what did you do?

By the COURT: Well, that is far enough.

Q. Well, now, I will ask you, Mr. Craft, how many children did you have? Son and daughter, didn't you?
A. Two that is raised grown.
Q. A son and daughter?
A. Yes, sir.
Q. Did you expect them to support you with all of this business that you have had, or did you do something for their support?
A. Why, at the time I was in this business, why my son's money was in with me.
Q. In what business, Mr. Craft?
A. This business I have described here to you and to the jury?

Q. Which business?
A. Cold drinks, selling groceries at Diaz, cold drinks and restaurant.
Q. You- son was interested with you in the business?
A. Yes, sir.
Q. At Diaz?
A. At Diaz and at Newport.
130 Q. And then the time at Newport in selling cold drinks?
A. Yes, sir.
Q. And then at what other place?
A. That is all the places we was in business.
Q. He wasn't in business with you while you were section foreman, was he?
A. No. Well, yes, sometimes he was.
Q. In what capacity?
A. Laborer.
Q. As a laborer?
A. Yes, sir.
Q. As a section hand?
A. Yes, sir.
Q. Under you as a section foreman?
A. Yes, sir.
Q. And then you were over him as section foreman at the time he was in business with you as a section hand in that? Is that the facts?
A. Yes, sir.
Q. Well, Mr. Craft, you are physically and mentally able to make your own living, aren't you?
A. I have it to do; I am not, though; I do do it.
Q. Yes, and running for office?
A. Yes, sir.
Q. Mr. Craft, how long have you been a resident of Jackson County?
A. I guess some eighteen or twenty years.
Q. And you have never resided in Pulaski County, have you—the county that Little Rock and Argenta is in?
131 A. Yes, sir.
Q. When was that.
A. That was when I was there with an extra gang doing work there; family on——
Q. Well, what time was that?
A. 1905, I think.
Q. 1905?
A. Yes, sir.
Q. How long were you residing in Pulaski County then?
A. Well, I couldn't say; we was down there doing some work with an extra gang; 1905, I think.
Q. You haven't resided there since 1905, in Pulaski County, either in Little Rock or Argenta?
A. No, sir, I haven't lived there.

Q. How does it come that these letters of administration were issued to you by the clerk of the Probate Court of Pulaski County?
A. By application.
Q. Who made the application?
A. I did.
Q. You did?
A. Yes, sir.
Q. Well, on whose advice? Was it young Mr. Gus Jones over there that lives in Little Rock?
A. No, sir.
Q. Well, whose? Just your own?
A. No, sir.
Q. Well, whose was it?
132 A. Mr. Jackson, of Jackson & Jones.
Q. Mr. Jackson is a partner of Mr. young Gus Jones. Brother Gus Jones that sits over there by Lonny Campbell; and Mr. Jackson did this for you?
A. No, I and him went together.
Q. You and Mr. Jackson went together?
A. Yes, sir.
Q. You were not a resident of that county at that time?
A. No, was not.

Redirect examination.

By Mr. Gustave Jones:

Q. At the time you were in Pulaski County working on the section, you still claimed Jackson as your home, didn't you?
A. Yes, sir.
Q. Your son died in Pulaski County, did he?
A. Yes, sir.

By Plaintiff's Counsel: Now, there are other lines we are going to develop, if Your Honor please. We are through with him except for that purpose.

133 (Exhibit "A" to Testimony of Plaintiff, J. T. Craft.)

Letters of Administration.

Estate of J. T. Craft, Jr., Deceased.

State of Arkansas,
County of Pulaski, ss:

To all to whom these presents shall come, Greeting:

Know ye, That whereas J. T. Craft, Jr., of the County of Pulaski, and State of Arkansas, died intestate, as it is said, on or about the 16th day of February, A. D. 1913, having at the time of his death personal property in this State, which may be lost, destroyed or diminished in value if speedy care be not taken of the same. To

the end, therefore, that the said property may be collected, reserved and disposed of according to law, we do hereby appoint J. T. Craft, Sr., of the County of Jackson, Administrator of all and singular the goods and chattels, rights and credits which were of the said J. T. Craft, Jr., at the time of his death, with full power and authority to secure and dispose of said property according to law, and collect all moneys due said deceased, and, in general, to do and perform all other acts and things which are, or hereafter may be, required of him by law.

In testimony whereof, I, Herbert S. Turner, Clerk of the County and Probate Courts, within and for the County of Pulaski aforesaid, have hereunto set my hand and affixed the seal of said court, at my office in Little Rock, this the 19th day of February, 1913.

[SEAL.] HERBERT S. TURNER,
County and Probate Clerk.

134 *Testimony of Cromwell West.*

CROMWELL WEST, witness for plaintiff, being produced and first duly sworn, testified as follows, to-wit:

Direct examination.

By GUSTAVE JONES, Esqr.:

Q. State your name to the jury?
A. Cromwell West.
Q. Were you acquainted with Tom Craft in his lifetime?
A. Yes, sir.
Q. What relation was he to J. T. Craft?
A. Son.
Q. Do you know whether he is dead or alive?
A. He is dead.
Q. How do you know it?
A. I saw him.
Q. Now, we are speaking of that same Tom Craft. Did you know his character and habits?

Defendant objects; overruled; exceptions.

A. Yes, sir.
Q. What were his habits?

Defendant objects; overruled; exceptions.

A. They were good.
Q. Well, that is your conclusion?
A. Yes, sir.

By PLAINTIFF'S COUNSEL: We will ask the court to instruct the jury that that is not a correct answer and disregard that. Save Mr. Campbell the trouble.

By the COURT (addressing jury): That is not a competent answer; might be a correct answer to the question; not competent evidence, Gentlemen.

Q. I didn't ask you the kind of habits he had; I asked you
135 what his habits were?

Defendant objects; overruled; exceptions.

A. I don't understand what he means.
Q. You know what habits are?

Defendant objects.

A. Yes, sir.

Defendant objects.

Q. That is what a man does, ain't it?

Defendant objects.

A. Yes, sir.

Defendant objects.

Q. If you know those habits, what were they?

Defendant objects.

A. Why he worked. And—I can tell it in my way; I don't know whether it is right or not. Why, he was a—he was one of the best boys in our neighborhood that I run with up there. He always stayed at home with his parents and worked and was obedient and went to church and took a great interest in Sunday School and things. He didn't go out and run around with the other boys and go to the river and things like that.

Defendant objects.

Q. Did you know whether or not he was a drinking man?

Defendant objects.

A. No, sir, he didn't drink; that is, to an excess. I never saw him drink any whiskey at all that I know of in my life. I saw him drink some beer, I believe.

Defendant duly objected, separately and severally, to each of the foregoing four questions and four answers; each of which objections the court overruled; and defendant at the time duly saved its exceptions thereto, separately and severally. And defendant duly requested the court to exclude from the jury each of said answers; and the defendant at the time duly saved its exceptions thereto, separately and severally.

136 Q. How long did you know him before his death?
A. I went to school with him several years.
Q. How many years did you know him before his death?
A. Somewhere around fifteen years.
Q. Did you ever have occasion to hear him say anything about contributing to his father?

Defendant Objects.

A. Why, yes, sir; he——

Defendant Objects.

(At this juncture, the court took adjournment for the day.)

(Court reconvened at 8:30 a. m. Feb. 7, 1914.)

By Mr. CAMPBELL, for Defendant: I renew the request made to the court yesterday afternoon, while Mr. Cromwell West was on the witness stand, to instruct the jury about anything that was said in answer to that last question, and the discussion of counsel in regard to the matter should be disregarded by them.

By the COURT: Gentlemen of the jury, argument was had yesterday evening with reference to the admissibility of evidence tending to show that the deceased had made statements with reference to his intention to contribute to the future support of his father; ought not to be considered by you one way or the other in the trial of this case and is not competent as evidence or is not law in the case.

137 *Testimony of J. T. Craft, Recalled.*

J. T. CRAFT, the plaintiff, being recalled, testified in his own behalf as follows, to-wit:

Direct examination.

By GUSTAVE JONES, Esqr.:

Q. Mr. Craft, had your son, the deceased, Tom Craft, contributed anything to you before his death?

Defendant Objects.

A. Yes, sir.

Q. Do you recall when the last time was and what the amount of it was?

Defendant objects.

A. It was some time the latter part of December, 1912.

Defendant Objects.

Q. How much was it?

Defendant Objects.

A. A hundred and sixty-eight dollars, I believe; hundred and sixty or sixty-eight dollars.

Defendant Objects.

Q. Before that, next before that, if anything, what was the amount and when?

Defendant Objects.

A. He gave me, I think the last time before that was in, I will

say probably October, the same year; I think if my memory serves me right, sixty or sixty-three or sixty-four dollars.

Defendant Objects.

Q. What, if any, contribution did he make to you before his majority, before he became of age?

Defendant Objects.

A. He had contributed to my support before and after he became twenty-one years old.

138 Defendant duly objected, separately and severally, to each of the foregoing five questions and five answers, separately, on the following grounds, to-wit:

First. That from the very nature of the question it calls for an answer that involves transactions with the deceased; and Mr. Craft is the administrator; and that it is incompetent under the statute as to transactions with the deceased.

Second. That it is too general, and immaterial.

Third. That as a proposition of law the burden is on the father to support a minor child instead of there being any burden upon a child to support his father; and this particular question goes during his minority.

But the Court overruled each of said objections; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally and in each separate instance.

And the defendant requested the court to instruct the jury that each of said questions and answers were improper, and to exclude from the jury each of said answers; but the court refused to exclude any of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally and in each separate instance.

Q. And I believe you stated that he was twenty-three years old at the time of his death?

A. In his twenty-third year, if I am not mistaken; yes, sir.

Q. What was his disposition, Mr. Craft, towards you?

Defendant Objects.

A. Why, dutiful, kind, supporting.

Defendant duly objected to foregoing question, which objection the swer; and requested the court to exclude said answer from the jury; but the court overrule- each of said objections and refused to exclude said answer; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Mr. Craft, I asked you yesterday about his habits and you stated what the court said was a conclusion, and which was excluded. Now, when I speak about his habits, is what his conduct was

139 more than a conclusion. What were his habits?

Defendant duly objected to foregoing question, which objetcion the court overruled and defendant duly saved its exceptions.

A. Why, his habits was moral, good.

Defendant Objects.

Q. I am not asking you the kind of habits at all; and of course, we will ask the court to tell the jury that that is not competent testimony and to disregard it.

By the COURT: Don't think that would make very much difference, but not very good evidence, and not competent, Gentlemen.

Q. I am not asking you the kind of habits he had; asking you their nature?

Defendant Objects; Overruled; Exceptions.

A. I don't know that I understand the question.

Q. I am not asking you to describe the habits; that is, to say what kind of habits; I am asking you to tell the jury what were his habits?

Defendant Objects; Overruled; Exceptions.

A. Why his habits were good.

By the COURT: He don't understand you, Mr. Jones. With reference to sobriety and industry and things of that kind.

Defendant Objects; Overruled; Exceptions.

Q. Yes, sir.

Defendant Objects.

A. Why, sober.

Defendant duly objected, separately, to foregoing question and answer; and requested the court to instruct the jury that said answer was incompetent and to exclude same from the jury; but the court overruled each of said objections and refused to exclude said answer; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

140 Q. How was his disposition with reference to labor?

Defendant Objects.

A. Industrious, laboring and supporting me.

Defendant Objects.

Q. Do you now what proportion of his time, during the time that he was old enough to work, or after his becoming of age, he put in at work?

Defendant Objects.

A. Why, all of it.

Defendant Objects.

Q. All of it?

Defendant Objects.

A. Yes, sir.

Defendant Objects.

Q. Well, you say "all"; all the time?

A. I don't think he was absent, I don't think he was ever absent from his work a week, as much as a week, to my certain knowledge, from the time he became twenty-one years old until his death.

Defendant duly objected, separately and severally, to each of the foregoing four questions and four answers; and requested the court to exclude each of said answers from the jury; but the court overruled each of said objections and refused to exclude any of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Do you know when he first went into the employ of the railway company or went into railroad work?

A. If I am not mistaken, it was in 1909 or 1910.

Q. In what capacity or whereabouts did he go to work at that time?

A. On the White river; brakeman.

Q. In what work?

A. Brakeman.

141 Q. Did he start right out braking?

A. Yes, sir.

Q. Had he done any previous railroad work?

A. Oh, yes, sir, some years before that he had worked on the track with me; he had held jobs in Wynne as both foreman and assistant foreman on the extra gang in 1905 and 1906; part of 1905 and 1906.

Q. While he was under age?

A. Yes, sir. And went to braking while he was under age.

Q. Do you know what one has to do or learn, if anything, with reference to doing the duties of brakeman on a railroad, before he gets the job?

Defendant Objects.

Q. Do you know that, I asked you?

By the COURT: Just say yes or no.

A. I do not.

Q. Do you know how long a brakeman—What is the next step above a brakeman? I will ask you that question. Do you know what is the next step, if there is any other step, above brakeman?

Defendant Objects.

By the COURT: You mean line of promotion.

By PLAINTIFF'S COUNSEL: Line of promotion.

By DEFENDANT'S COUNSEL: The witness has never said he has been anything except section hand and section foreman.

A. From braking to conductor.

Defendant Objects.

Q. In promotion, a brakeman becomes a conductor in a certain length of time?

Defendant Objects.

142 A. Yes, sir.

Defendant Objects.

Q. Do you know whether or not your son, Tom Craft, was in the line of promotion?

Defendant Objects.

A. Yes, sir.

Defendant Objects.

Q. You do know that.

Defendant Objects.

A. I do know it.

Defendant duly objected, separately and severally, to each of the foregoing four questions and four answers; and requested the court to exclude each of said answers; but the court overruled each of said objections and refused to exclude any of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally and in each separate instance.

Q. Now, Mr. Craft, how do you know that?

A. By a conversation that I had with the train master, or that I and him had together after he went braking.

Defendant objects and asks the court to instruct the jury to disregard all the testimony of this plaintiff as to his son being in line of promotion.

By the COURT: The statement made by the witness that he knew his son was in line of promotion is competent evidence for you (jury) to consider. The statement made by the witness that he was advised of that by some man in authority is not competent evidence for you to consider.

By Mr. CAMPBELL, for Defendant: I except to the ruling of the court as to telling them that it is competent evidence for them to consider about his son being in line of promotion.

Q. I believe you said that you were the administrator of his estate?

A. Yes, sir.

By PLAINTIFF'S COUNSEL: We offer a certified copy of the order of appointment of Mr. Craft as administrator of Tom Craft's estate, and without objection we will ask that it be considered read.

By the COURT: All right.

143 (Said copy is hereto attached and marked exhibit "B" to the testimony of the plaintiff J. T. Craft.)

Cross-examination.

By S. D. CAMPBELL, Esqr.:

Q. Mr. Craft, did you talk to Mr. Jones last night about this case or did he talk to you?

A. No, sir.

Q. Did you see him last night?
A. I did not.
Q. This morning, did you see him?
A. Never saw him until since we come in the court room, I don't believe.
Q. Well, whom did you talk to about this case, or with?
A. No one.
Q. Nobody at all?
A. Not a soul.
Q. Nobody at all?
A. No, sir.
Q. You had been living at Helena for some time; you were living there at the time of this accident, weren't you?
A. Yes, sir.
Q. Mr. Craft, how long had it been since Mr. Tom Craft had been a member of—living with you, just living with you?
A. I think it was May; May, I believe; May or June; I think it was in May.
Q. Of what year?
A. 1912, I believe.
Q. May, 1912?
144 A. I think it was May, 1912, yes, sir.
Q. When was it that this accident happened?

By the COURT: You needn't answer that question.

Q. How long before the accident happened was it that he had been living with you as a part of your family, living with you?
A. I just answered it.
Q. Or boarding with you?
A. I had answered the question, Judge, Your Honor.
Q. That is all the answer you give to it; how long was it?
A. May, I think it was May, probably middle of May; probably first of May; sometime in May or June.
Q. Isn't it a fact that he had been living apart from you, boarding himself for a considerable while, a good long time?
A. Yes, sir.
Q. That is a fact, isn't it? That is a fact, paying his own expenses and his own board?
A. Oh, yes, yes, sir.
Q. And you hadn't been doing anything for him, paying his expenses or his board?
A. No.
Q. And you didn't do anything towards educating him, did you?
A. Towards which?
Q. Towards educating him?
A. Prior to his age twenty-one?
Q. Yes?
A. Sure, yes, sir.
145 Q. Did he go to the public schools?
A. Yes, sir.

Q. And in the public schools, how long did he attend the public schools?
A. Oh, I couldn't say; four or five years.
Q. When did he quit the public schools?
A. Now, I don't know.
Q. Don't know that?
A. No, sir, I don't.
Q. Why don't you know it? If he was living with you, you were his father; why don't you know when he quit going to school?
A. I had no occasion to set it down or keep record or anything; keep a man in that line of business to keep tab.
Q. You can't recall when he quit going to public school, at all?
A. No, sir, I don't know, know the last day he went to school.
Q. Do you know what year it was?
A. No, sir, I don't.
Q. Was it before he became twenty-one years old?
A. Yes, sir, he didn't go to school any after he was twenty-one, I don't think.
Q. Well, how old was he when he did quit?
A. I told you I couldn't tell you.
Q. Couldn't tell?
A. No, sir, I don't know that.
Q. Well, then, if you can't recall when he quit going to school when he was living with you, how is it that you are telling
146 the jury about his taking care of you instead of you taking care of him?
A. Why, he taken care of me later than he went to school; that was the last days of his life.
Q. And you can't tell how long you quit taking care of him yourself, when he was a boy, as to going to the schools?
A. No, I can't.
Q. Don't know anything about that at all?
A. No, sir.
Q. You are fifty-three years old?
A. Yes, sir.

147 STATE OF ARKANSAS,
County of Pulaski:

In the Pulaski Probate Court.

Be it remembered, That at the January Term 1913 of the Pulaski Probate Court: Present the Hon. Joe Asher, Judge, presiding, among others the following proceedings were had in said Court on the 19th day of February, 1913, a day of said term, to-wit:

In the Matter of the Estate of J. T. CRAFT, JR., Deceased.

Now is presented to the Court the Application of J. T. Craft, Sr., for appointment as Administrator of the Estate of J. T. Craft, Jr., deceased, late of Pulaski County. Also is presented his bon- in the

sum of Tow Hundred Dollars with W. D. Jackson and P. H. Ruebel as sureties thereon.

Said bond being by the court deemed good and sufficient is approved the application is granted and letters are ordered to issue.

(Exhibit "B" to the testimony of J. T. Craft.)

148 (EXHIBIT "B" TO TESTIMONY OF PLAINTIFF J. T. CRAFT.)

Certificate of Authentication.

STATE OF ARKANSAS,
County of Pulaski, ss:

I, Herbert S. Turner, Clerk of the County and Probate Courts, within and for the County and State aforesaid, do hereby certify, that the foregoing page of typewritten matter contains a true, complete and perfect transcript of the order of the Court in the matter of the appointment of J. T. Craft, Sr., as Administrator of the Estate of J. T. Craft, Jr., deceased, as therein set forth, and as the same appears on file and of record in Record Book "27," Probate Court Record Vol. 27, page 427, Pulaski County, State of Arkansas.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Courts at the City of Little Rock, Arkansas, this 6th day of February, A. D. 1914.

HERBERT S. TURNER,
County and Probate Clerk.

STATE OF ARKANSAS,
County of Pulaski, ss:

I Joe Asher, Judge of the County and Probate Courts, within and for the County and State aforesaid, do hereby certify, that Herbert S. Turner, Esqr., whose name is subscribed to the foregoing certificate, is the Clerk of the County and Probate Courts, duly elected, commissioned, qualified and acting and under our laws the legal custodian of the records of said Courts, and that he is the
149 proper officer to make said certificate and that said certificate is in due form of law and that his acts as such clerk are entitled to full faith and credit.

In testimony whereof, I have hereunto set my hand as Judge of the County and Probate Courts, at the City of Little Rock, State of Arkansas, this 6th day of Feb'y A. D. 1914.

JOE ASHER,
County and Probate Judge.

STATE OF ARKANSAS,
County of Pulaski, ss:

I, Herbert S. Turner, Clerk of the County and Probate Courts within and for the County and State aforesaid, do hereby certify, that Hon. Joe Asher, whose name is subscribed to the foregoing certificate, is the Judge of the County and probate Courts for Pulaski

County, State of Arkansas, and that his acts as such are entitled to full faith and credit and that said certificate is in due form of law.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Courts at the City of Little Rock, Arkansas, this 6 day of February, A. D. 1914.

HERBER S. TURNER,
County and Probate Clerk.

150 *Testimony of Dr. M. P. McNeill.*

Dr. M. P. McNeil, witness for plaintiff, being produced and first duly sworn, testified as follows, to-wit:

Direct examination.

By Gustave Jones, Esqr.:

Q. State your name to the jury?
A. Dr. M. P. McNeill.
Q. Where do you live?
A. 116 North Street, Little Rock, Ark.
Q. What is your business or occupation?
A. Physician; coroner of Pulaski County, Ark.
Q. Did you hold that position as coroner in 1913, a year ago?
A. 1913, yes, sir.
Q. Did you know Tom Craft in his lifetime, Doctor?
A. Not that I know of; I may have known him; not paid any particular attention to him.
Q. Did you hold an inquest as coroner over the dead body of Tom Craft?
A. I did.
Q. Did you see him, see the body?
A. I did.
Q. I wish you would tell, Doctor, to the jury, what injuries, if any, you found upon his person?
A. Well, I have so many cases of that kind that it is really hard to remember all the injuries on any one body unless I——
Q. Don't care about all of them.
A. Well, he was run over by a coal car, by one wheel of a coal car, run across the lower part of the abdomen; and as well as
151 I remember——

By Mr. Campbell, for Defendant: Doctor you didn't see the coal car run over him; and ask the court to instruct the jury that is incompetent.

By Plaintiff's Counsel: That would be incompetent.

By the Court: Let the statement of the witness be withdrawn. That is not evidence.

Q. You don't know of your own knowledge anything about the circumstances; all I want you to do is to tell the jury what discoveries you made with reference to the injuries; not how it happened, but what injuries you saw?

A. Well, I think there was, as near as I remember, there was two openings in the lower part of the abdomen here as if some heavy pressure had beared on it, crushed; and, as I remember, one of the testicles was greatly swollen, enlarged like it was gouged out, you know; separated or something. And I don't exactly remember now whether it was the left leg or not, but I think there was something the matter with the left leg; just merely a thought; may be right and may be wrong; wouldn't want to say.

Q. From the examination you made and examination of the injuries, character and extent of them what would you say those injuries resulted in?

A. Resulted in his death.

Q. When was this autopsy or coroner's inquest held?

A. There was no autopsy held to my knowledge; I never ordered any.

Q. The inquest was held Feb. 17, 1913?

A. As near as I remember; 17th of February, 1913, Tom Craft.

152 Q. At whose undertaking rooms, if any?

A. P. H. Reubell & Co.'s Little Rock, Ark.

Cross-examination.

By S. D. CAMPBELL, Esqr.:

Q. Doctor, the injuries that you found you stated caused his death?

A. Yes, sir.

Q. Those injuries were of such a nature as to cause immediate death, weren't they?

A. Well, now, not in all cases; it may and it may not.

Q. It may and it may not?

A. Yes, sir. I would like to state, though, that, if you want me to, I asked the question——

Q. Do you know when he died, of your own knowledge?

A. No, sir.

153 *Testimony of Cromwell West, Recalled.*

CROMWELL WEST, witness for the plaintiff, being recalled, testified as follows, to-wit:

Direct examination.

By S. D. CAMPBELL, Esqr.:

Q. You were on the stand yesterday?

A. Yes, sir.

Q. Do you know, of your own personal knowledge, anything about Tom Craft, deceased, contibuting to his father, J. T. Craft, any amount of money?

Defendant Objects.

A. Yes sir.

Defendant Objects.

Q. Tell when it was and the circumstances of your knowing it?

Defendant Objects.

A. Well, when they run the store up there at Diaz, I was working nights over there for Wilmans at the gin, was foreman over there, and Tom Craft run the baling box for me; and Saturday nights they would pay off over there, he would take his money over there and hand it over to his father.

Defendant Objects.

Q. You have seen him do that?

Defendant Objects.

A. Yes sir.

Defendant Objects.

Q. Was that after or before he was twenty-one years old?

Defendant Objects.

A. Well, it was after he was Twenty-one, for because he had been at work braking on the White River.

Defendant Objects.

Q. Before that?

Defendant Objects.

A. Before that. And he quit braking and come home on account of his father being sick, and took charge of the store there; and after his father got up able then to come back and sit around
154 the store, (Defendant objects) sit around the store there, why Tom then went to work over there at nights at the gin, and would help out at the store there in the day time.

Defendant Objects.

Defendant duly objected, separately and severally, to each of the foregoing five questions and five answers; and requested the court to exclude from the jury each of said answers; but the court overruled each of said objections and refused to exclude any of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally and in each separate instance.

Q. And you saw him give money to his father while he was working there at the gin?

Defendant Objects: Overruled: Exceptions.

Defendant requests the court to instruct the jury the foregoing question is improper.

By Mr. JONES, for Plaintiff: Well, we withdraw that, then, that form.

Q. Do you know whether Tom Craft went to work for the Railroad Company, Iron Mountain Railroad Company?
A. Yes, sir.
Q. With reference to his working at the gin you have just detailed, was it before——

Defendant Objects.

A. Why, when he quit the railroad and come home there to the gin, why he got his check sent to him and I saw him endorse that and hand it to his father there in the store.

Defendant duly objected, separately, to the foregoing question and answer; and requested the court to exclude from the jury said answer; but the court overrule- each of said objections and refused to exclude said answer; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Well, what other contributions, if any, did you see him
155 make to his father?

Defendant Objects: Overruled: Exceptions.

A. Why, when he would give his father his wages that way, he would tell him "Now, if you"——

Defendant Objects: Sustained.

Q. Just what you saw him do.
A. Well, I have told about all I saw him do.

Cross-examination.

By S. D. CAMPBELL, Esqr.:

Q. Mr. West, when was it that Mr. Tom Craft worked at the gin?
A. It was in the fall that they run the store at Diaz.
Q. Well, what year was that, when they run the store at Diaz?
A. Well, I wouldn't say for sure, but I believe it was in 1910.
Q. 1910?
A. Yes, sir, I never thought anything about it and never kept up with the time.
Q. Well, you know about how old Tom was then?
A. No, sir, not exactly.
Q. Don't you know whether he was twenty-one years old or not at that time when he run the gin, when he was working at the gin?
A. Well, I suppose he was by him working for the Railroad Company.
Q. You don't know whether he was twenty-one years old or not when he was working at the gin then?
156 A. No, I never did ask him how old he was when he was working there.
Q. Now, as to schecks you saw handed over, when was that?
A. Why, it was sometime in the fall or—I don't remember just what time of the year it was, but any how his father took down sick with rheumatism or something; I never asked particular what it

was or anything; I just went down to see Mr. Craft like neighbors would do and Tom found out that his father was ill and he quit the road and come home. He was then braking on the White River.

Q. What year was that?

A. Why, I think it was in 1910.

Q. 1910?

A. Yes, sir; it might have been 1911; I won't say positively what year it was because, just like I said, I never kept up with the dates or anything like that.

Q. Tom and his father were partners in running a store up there at Diaz, weren't they?

A. I don't know whether they were partners or not; I understood it was Tom's; that is the way I understood.

Q. You understood it was Tom's?

A. Yes, sir.

Q. Tom's business?

A. Yes, sir.

Q. And Mr. Craft over there, Tom's father, was managing the business for Tom, was he?

A. Well, Tom always kept the books when he come home from the railroad there.

157 Q. Then it was Tom's business, as you understand it, and Tom's checks went into the business?

A. Well, I don't know whether they went into the business or not; couldn't say about that.

Q. But you understood it was Tom's business, that store up there?

A. Well, he handled the books and things like that; he was the manager of it; of course, Mr. Craft gave checks and bought stuff just like Tom did.

Q. But you understood it was Tom's business?

A. Well, by him handling the books and everything, I suppose it was his; I don't know which one's it was; but by Tom's handling the books and things of that kind, I suppose it was his. I don't know how they handled the bank account, or anything like that.

158 *Testimony of T. J. Hightower.*

T. J. HIGHTOWER, witness for plaintiff, being produced and first duly sworn, testified as follows, to-wit:

Direct examination.

By GUSTAVE JONES, ESQR.:

Q. What is your name?

A. T. J. Hightower.

Q. Where do you live?

A. Weldon, Ark.

Q. Do you know Mr. J. T. Craft?

A. That gentleman there, yes, sir.

Q. Did you know his son Tommy Craft in his lifetime?

A. I did.

Q. Were you ever near where they lived or worked with either one of them at any time?
A. No, sir, I never worked with either one of them.
Q. Did you know whether Tom Craft ever worked on the Iron Mountain Railroad or not?
A. I did.
Q. How do you know that?
A. He told me that he did.

Defendant objects.
By the COURT: That is not competent, what he told him.

Q. Did you ever see him working on the railroad?
A. No, sir.
Q. Did you have occasion to observe his disposition towards his father.

Defendant objects: Overruled; Exceptions.

Q. Understand the question; did you observe or have oc-
159 casion to observe his disposition towards his father? And that question must be answered yes or no.
A. I don't understand, Mr. Jones.
Q. Well, that is as plain as I can make it; read the question.
By the COURT: Can you answer the question?
A. Well, gentlemen, if I understood what you mean maybe I could answer it.
Q. Well, do you know how he was disposed or felt towards his father?

Defendant Objects.

Q. Now, just answer that yes, or no.
A. Nothing only what he told me.
Q. Did you ever see him do anything that would indicate to you how he felt towards his father?

Defendant objects.

A. Nothing only what he told me.

Cross-examination.

By S. D. CAMPBELL, ESQR.:

Q. Now, Mr. Hightower, I don't care to ask you any questions in the matters you have testified to because you don't know anything about this case, the circumstances of it, but I do want to ask this question, by permission of the court; the court in making up this jury yesterday asked if you were here; have you seen any of the petiti jury tal-ing to Mr. Craft or any——

By the COURT: Needn't answer that question; this is not the time for such evidence as that.

160 *Testimony of L. H. Tanner, Recalled.*

L. H. TANNER, witness for plaintiff, being recalled, testified as follows, to-wit:

Direct examination.

By GUSTAVE JONES, ESQR.:

Q. You are the same Mr. Tanner that testified in this case yesterday?
A. I believe I am, yes, sir.
Q. Well, I mean you are the same individual?
—. ——.
Q. Well, I believe you said you were the foreman of the switch crew that was operating at the time of this accident?
A. Yes, sir.
Q. Now, as foreman of that crew, Mr. Tanner, what did you have to do with Train 66?
A. I had to make it up; what we call making it up.
Q. Making it up ready to depart?
A. Yes, sir.
Q. Did you know the time that it did depart?
A. I did.
Q. Now, what would be necessary for that train, after you made it up, to depart?
A. What would be necessary?
Q. Yes?
A. For it to depart?
Q. Yes?
A. Why, nothing necessary only for the crew to get out of town; that was all.
161 Q. Then when you had the train made up, then what did you do with the train?
A. I didn't do nothing; I went ahead with my other work.
Q. How did the crew know that the train was ready?
A. When there was a caboose and engine on.
Q. Then your duty would be to turn it over to the conductor of the train, would it?
A. Yes, sir; that is, whenever the engine goes on, why he is notified that his train is ready.
Q. Did you have any duty in connection with calling the crew for this train?
A. No, sir.
Q. In order then for that train to move, after you had made it up, it was necessary to have a crew?
A. Yes, sir.
Q. Now, you knew that the crew would be there to take the train, or was there to take the train when you finished making it up, did you?
A. I knew that they should be there; didn't know whether they were there or not because that was none——

Q. You expected them to be there?
A. Sure, there had to be a crew to take it out, and supposed to be a call for them.
Q. In order to get to that train that you had made up, it was necessary for the crew to go through the yards?
A. Yes, sir, had to get to the train.
Q. I believe you stated that you knew Tommy Craft?
A. Yes, sir.
162 Q. Did you know where he roomed?
A. Yes, sir.
Q. How did you know that?
A. Well, I roomed at the same place.
Q. Did you know Mr. Tanner, about the manner of Tom Craft's work?

Defendant Objects.

A. Well, yes——

Defendant Objects.

Q. Did you know it?

Defendant Objects.

A. I know in a way; I never knew of him laying off when he had a chance to work.

Defendant duly objected, separately and severally, to each of the foregoing two questions and two answers; and requested the court to exclude each of said answers from the jury; but the court overruled each of said objections and refused to exclude either of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. How long did you and he room at the same place, Mr. Tanner?
A. I should judge four or five, probably six months; something like that.
Q. With reference to his death, was it immediately before, or was there an intervening time before?
A. Well, when he was there—I was there all the time and he was only in just once in a while; of course, I don't know——
Q. When he would come back on his run, of course, he would be there?
A. Yes, sir.
Q. Was that the six months immediately preceding his death?
163 A. Yes, sir.
Q. Did you have an opportunity and did you observe his habits?
A. No, sir.
Q. With reference to drinking?
A. No, sir.
Q. Did you observe his work on his—when he was at work?
A. No, sir.

Q. You didn't go out?
A. No, sir.
Q. You just stayed in the yards?

Cross-examination.

By S. D. CAMPBELL, ESQR.:

Q. Mr. Tanner, how far apart are those railroad tracks in the Argenta yards?
A. Well, there are different——
Q. Five and six, tracks numbered Five and Six were designated by you yesterday?
A. Well, I should judge that they are about between nine and ten and a half feet or eleven feet, maybe eleven feet; something like that; I never measured them; that is from center to center, you understand; I don't mean from the inside rail to inside rail, because that would be an unusual wide track.
Q. When you saw Mr. Tom Craft injured, he was not conscious, was he?
A. I don't think so.
Q. Don't think he was conscious?
164 A. No, sir.

Plaintiff objected to each of the foregoing two questions and two answers; and the court sustained each of said objections and excluded each of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

165 *Testimony of Geo. M. Sink.*

GEORGE M. SINK, witness for the plaintiff, being produced and first duly sworn, testified as follows, to-wit:

Direct examination.

By GUSTAVE JONES, ESQR.:

Q. State your name to the jury?
A. George M. Sink.
Q. What business are you in?
A. Life insurance business.
Q. Old Line or Fraternal insurance?
A. Old line; I represent the New York Life.
Q. Have you a table, the American Mortality Table?
A. Yes, sir.
Q. With you?
A. Yes, sir.
Q. I wish you would examine those tables, Mr. Sink; do you know what the expectancy of a man fifty-three years of age is?
A. I couldn't tell without referring to the table.
Q. Could you refresh your recollection by examining the tables, or examine the tables and say?
A. Yes, sir.

Q. Wish you would do so, please, sir.

Defendant Objects: Overruled: Exceptions.

Q. What tables are those, did you say?
A. The American Table of Mortality.
Q. All right.
A. What age?
Q. Fifty-three.
166 A. Eighteen and 79/100 years expectation of life.

Defendant Objects.

Q. A man fifty-three years of age?

Defendant Objects.

A. Fifty-three years old, yes, sir.

Defendant Objects.

Q. Would be expected to live eighteen——

Defendant Objects.

A. And 79/100 years, yes, sir.

Defendant Objects.

Q. Eighteen and 79/100?

Defendant Objects.

A. Yes, sir.

Defendant duly objected, separately and severally, to each of the foregoing four questions and four answers; and requested the court to exclude from the jury each of said answers; but the court overruled each of said objections and refused to exclude any of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Cross-examination.

By S. D. CAMPBELL, Esqr.:

Q. Mr. Sink, you don't know anything about how those tables are prepared, do you?
A. No, sir.
Q. No knowledge at all of that?
A. No, sir.
Q. And you don't know whether or not it is the average man, or a man in good health, or a man in bad health that is taken as the basis of that?
A. Yes, this is taken as a basis a man in average health.
Q. Just average health?
A. Yes, sir.
Q. And you don't know anything about what would be
167 the expectancy of a man that would be in bad health?
A. No, sir.

Q. Nor anything about the expectancy of a man that would be a strong man like Mr. Craft over there, do you?
A. Well, I may have misstated this; now, this table is based on those that are insurable.
Q. It is just the basis of a life insurance proposition, isn't it?
A. Life Insurance proposition, yes, sir.
Q. And has nothing to do with any other purpose?
A. No, sir.
Q. You don't know, Mr. Sink, whether Mr. Craft would be an insurable risk or not, do you?
A. No, sir, I do not.
Q. Not the least idea about it?
A. No, sir, don't know that about anybody until I try it.

Redirect examination.

By Mr. JONES:

Q. The American Mortality Tables is recognized authority, isn't it?

Defendant Objects.

A. Yes, sir.

Defendant duly objected, separately and severally, to the foregoing question and answer; and requested the court to exclude said answer from the jury; but the court overruled each of said objections and refused to exclude said answer; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Wish you would tell us what the expectancy of a man twenty-three years of age is?
A. Forty and 17/100 years.
168 Q. And you tell the jury that a man, according to those tables, that a man twenty-three years old would be liable to live longer than a man fifty-three years old. Would it or would it not?

Defendant objects to foregoing question.
Question withdrawn.
Plaintiff rests.

169 The defendant, to maintain the issues on its behalf, introduced the following witnesses and testimony, to-wit:

Testimony of L. H. Tanner, Recalled.

L. H. TANNER, who testified heretofore as witness for the plaintiff, was recalled by defendant and testified on further cross-examination as follows, to-wit:

Further cross-examination.

By S. D. CAMPBELL, Esqr.:

Q. You testified yesterday in this case and was also recalled. You testified yesterday on behalf of the plaintiff and also recalled by the plaintiff today and I asked you if when you saw Mr. Tom Craft in the injured condition if he seemed to be conscious, suffering any conscious pain?

A. He didn't seem to be conscious — pain.

Q. Didn't seem to be conscious?

A. No, sir; that is, to my knowledge, what I would think, he wasn't.

Q. And you testified that you had roomed with him for six months before this accident?

A. That I had roomed at the same place; not direct in the same room.

Q. Were you one of the first men to him after the accident occurred?

A. Yes, sir, I believe that I was; Mr. Speer and myself I should think was the first ones to him.

Q. You and Mr. Speer?

A. I think so, yes, sir; about one of the first.

Q. And then you carried him up to the house, didn't you, or help carry him?

170 A. I helped to carry him to the office.

Q. Helped to carry him to the office there in Argenta?

A. Yes, sir.

Q. Didn't seem to be conscious then, did he? Did he seem to be experiencing any conscious pain at that time?

A. Well, nothing only as I stated yesterday, his muscles, you could see his muscles move in his body.

Q. And that is all the manifestations?

A. That is all that I could—yes, sir.

Q. And from your six months' acquaintance with him, rooming with him and observing him, and then seeing him right after the accident, what is your opinion as to his having, being conscious of pain and suffering.

By Mr. JONES, for Plaintiff: I think without objection I have let that go about as far as proper; asking for an opinion; not being an expert, looks like he might let the jury hear with reference to his acts and let them conclude. It is the very question involved in one branch here, whether or not there was conscious pain or suffering, and that is exclusively the province of the jury to determine what in their opinion was the truth. It seems to me that

all this witness could do would be to tell the jury what he observed him do; and I do not think that we can be held nor the jury be controlled by the opinion of a non-expert, especially, and asking his conclusions; and we submit, if Your Honor please, that all he could tell would be what the man did.

171 By the COURT: The jury will have to draw its own conclusions as to whether or not there was conscious suffering of pain at the times testified to by the witness; but the jury may also consider the opinion of the witness in this respect in arriving at that conclusion, giving it such weight as you feel like it is entitled to receive; but after all, you have got to be the judge yourself as to whether or not there was conscious suffering of pain. He has answered the question, Mr. Campbell.

By Mr. CAMPBELL: May the witness answer the question?

By the COURT: He has already answered it.

By Mr. CAMPBELL, for Defendant: I don't recall that he did. Objection was made before he answered the question.

By the COURT: Oh, well, he said—You need not answer the question. He has already answered it.

Defendant at the time, duly saved its exceptions to the ruling of the court in refusing to permit the witness to answer said question.

By Mr. CAMPBELL, for Defendant: Defendant states that it expects to prove by the witness, that the answer would be that in his opinion there was no conscious pain and suffering.

By the COURT: The reason given by the court for not permitting the witness to answer this question is because he has already answered the same question in a different form.

Defendant at the time duly saved its exceptions to the action of the court in refusing to permit it to make the proof mentioned by this witness, as set out hereinabove.

172 Redirect examination.

By Mr. JONES:

Q. Do you remember, Mr. Tanner, his movements, Tom Craft's movements, either when you were taking him out from under the car or when he was on the cot?

A. I didn't help take him out from under the car; all I did under the car was I got under there and tried to speak to him, and I left him there after we got the car pinched off of him.

Q. You didn't go up to the office with him?

A. I did.

Q. Did you observe him on the cot?

A. I said that his muscles moved; that was all.

Q. You are holding up your hands; what do you mean by that?

A. I am not lying down. You could see his muscles jerk, his body quiver.

Q. Muscles in what part of his body?

A. Well, his whole body, I should judge, would cover; just his muscles would be jerking.

Q. They would jerk like what?

A. Well, they would jerk like a person would be suffering, dying, or in that manner; that is, that that is the way that I would judge it.
Q. Not like one jerks when he laughs?
A. No, certainly not.
Q. Sir.
A. No, I don't suppose a man would jerk that a way when he would be laughing, unless he would be laughing very hard.
Q. Now, he was breathing the last time you saw him?
A. Yes, sir.
173 Q. And you heard him groan?
A. I heard him groan once or twice under the car.
Q. I never asked you how often you heard him groan?
A. Yes, sir.
Q. And you saw him move his body?
A. I saw his muscles move; not his body; what I mean, the muscles of his body.
Q. The muscles are part of his body, ain't they?
A. Yes, sir.
Q. You saw them move?
A. Yes, sir.
Q. You saw him raise his arm?
A. No, sir.
Q. You saw him, when he was down under the car, lift his arm up?
A. No, sir.
Q. You didn't see that?
A. No, sir.
Q. You didn't see him try to lift his body up off the ground?
A. No, sir.
Q. You didn't see that?
A. No, sir.

Recross-examination.

By Mr. S. D. CAMPBELL:

Q. You didn't hear any groans as you were carrying him over to the office?
A. No, sir.

174 Redirect examination.

By Mr. JONES:

Q. You were not carrying the cot?
A. I was helping carry it.
Q. Sir?
A. I was helping carry it.
Q. Which end, foot or head?
A. I don't remember; I rather think I was on the side.
Q. How many were with you?
A. Four or five, five or six maybe; never noticed; as many as could get a hold of it, as for that matter.

175 *Testimony of D. T. Wachter.*

D. T. WACHTER, witness for defendant, being produced and first duly sworn, testified as follows, to-wit:

Plaintiff's Counsel requests the court to instruct the jury that the fact that this witness has not been under the rule should be considered by them as going to his credibility.

By the COURT: It is proper that all witnesses be put under the rule; and when they are called and used as witnesses and not placed under the rule, after the request has been made, the fact that they have not been under the rule as witnesses goes to their credibility and is considered to this extent as going to their credibility.

Defendant objects and excepts to the statements of the court to the jury because no witness has yet testified that he has been in the court room at all; and tends to discredit the witness.

Direct examination.

By S. D. CAMPBELL, Esqr.:

Q. State your name to the jury?
A. D. T. Wachter.
Q. Where do you live, Mr. Wachter?
A. Little Rock.
Q. Have you been sworn as a witness in this case?
A. I have.
Q. Have you been under the rule and in the witness room?
A. I have.
Q. Have you been in the court room during the progress of this trial?
A. I have not.
By PLAINTIFF'S COUNSEL: Have you got a twin brother?
A. No, sir.

By the COURT: Unless the witness has been in the room, Gentlemen, none of these objections which have been raised ought to be considered by you.

176 By DEFENDANT'S COUNSEL:

Q. How long have you been Superintendent of Terminals at Argenta?
A. Eighteen months.
Q. And before being Superintendent of Terminals at Argenta, what was your employment?
A. I was the Yard Master at the same terminals.
Q. How long have you been acquainted with the Argenta Yards?
A. For the past three years.
Q. Do you know the distance between, approximately the distance between tracks No. 5 and 6 in the Argenta Yards?
A. Why, I never measured the distance, but they are somewhere in the neighborhood of thirteen foot centers.

Q. Thirteen foot centers?
A. Something like that.

By PLAINTIFF'S COUNSEL: If he hasn't measured them, don't think he ought to say.
By the COURT: Unless you know, ought not to say.

Q. I am asking him if he knows about it, Your Honor, to approximate it. Can he approximate it?

By PLAINTIFF'S COUNSEL: Don't object to that.

A. About thirteen feet; that is, about thirteen foot centers.
Q. Well, what do you mean by centers?
A. From the center of one track to the center of the other.
Q. And that is the way you approximate it without having measured it yourself?
A. It is.
Q. How long, Mr. Wachter, have you been acquainted with the switching of cars in the yards at Argenta?
177 A. Three years.
Q. In moving those cars in the yards, do you know the rule as to whether or not when a car is kicked off, as to being lights on that particular car or a person on that particular car? Do you know that?
A. I do.
Q. Well, what is that? Tell the court and jury, please.
A. In that particular part of the terminals, it is not customary to do that; in fact, it is not practicable in switching of cars. We have some parts of the terminals that require that in order to protect the car and control it with the hand brakes in order to avoid damaging the equipment or contents of the cars. In other words, that section of the yard where that accident occurred is level, and for that reason it is not necessary for any one to be on the car to protect it.
Q. Would it be practicable at this part of the yards in Argenta to have a man on each car that is "Kicked off", as the term has been used in doing the work there in the yards?
A. It would not.
Q. Now, at Argenta, describe to the jury the yards there, the way they are located?
A. You mean the different parts——
Q. And the work that is done there at Argenta as to the way of making up trains; just give the jury a general idea about that?
A. In the Argenta yard proper, it is known as the "train yard" for the handling of all south and north bound freight trains;
178 and in making up trains, it is necessary, of course, to classify and assemble the cars in the different directions that they may be going. And in assembling them in that manner, in the north end of the yard, or in other words at the Ft. Smith Crossing, those cars are cut off and kicked in on the various tracks without any protection or any one riding those cars, in other words; start at sufficient speed to carry them the distance they are intended

to go. At the south end of this same yard, near the Baring Cross Bridge, on account of the gravity, it is necessary for men to ride the cars on practically half the tracks in that section of the terminals.

Q. At that point you are speaking about, is that where the accident occurred, or not?

A. At the former place I just mentioned is where the accident occurred. Those men ride those cars to protect them, to avoid damage to the equipment as well as the contents of the freight, on account of the gravity of the tracks. And we have two or three places on the other side of the river, known as Little Rock and East Little Rock where it is also necessary for men to ride cars in the same manner in order to protect them.

Q. Where this accident occurred, has there been any rule or necessity for men riding cars when the cars are cut and worked in the yards there?

A. None whatever; it is not practicable to do so; never has been done and never will be done.

Q. About what, make an estimate—I asked you that,
179 though, about the distance between the tracks. Now, the brakemen, when a train is being made up there in the yards, what are the brakemen expected to do, the persons that compose a train crew, with reference to getting over there to take a train when the train is made up, with reference to looking out for themselves?

A. The rule requires all trainmen to be on duty thirty minutes before leaving time of the train which they are called to go out on and to look the train over, examine it; have the doors on empty cars closed and see that loaded cars are sealed and cars in proper condition, so far as their ability is concerned in inspecting them.

Q. What does a brakeman do with reference to carrying a light himself? What is the rule in regard to that?

A. Well, at night, or after sun-down, they have a lantern.

Q. Why is a brakeman required to carry a lantern?

A. So as to make the proper examination of the train and light his way to see where he is going and what he is doing.

Q. Is the brakeman in carrying his lantern over there expected to do anything with reference to looking out for himself in those yards?

A. Oh, certainly; all the employees are supposed to take sufficient precaution to protect themselves.

Cross-examination.

By GUSTAVE JONES, Esqr.:

Q. At night the brakeman would give signals by hand, would he?

180 A. Give signals with the lantern.

Q. Why didn't you say then, when you were telling what he used the lantern for, that it was to give signals with?

A. That is one performance of the lantern.

Q. You just omitted that because you didn't think about it at the time, did you?

A. That is it, I didn't think about the signals; however, the——

Q. That is all I asked you.

A. I would like for him to——

Q. What did you say your name was?

A. Wachter, W-a-c-h-t-e-r.

Q. I will ask you if you were not here yesterday afternoon in the court room, sitting in the middle tier of the seats there during the progress of the trial?

A. No, sir; and I can prove it by four or five that I was in the room with.

Q. You say you were not in the court room?

A. No, sir.

Q. Yesterday afternoon?

A. No, sir.

Q. At all?

A. No, sir, not after I was sworn as a witness.

Q. You were not sworn with the other witnesses, were you?

A. Yes, sir.

Q. Did you say you had a brother here?

A. No, sir, I have not.

Q. But you were in the court room?

A. I was in the court room up until the time I was sworn
181 as a witness; and since then I haven't been in here until I was called just now.

Q. Now, that never had been and never will be that you have anybody on one of those cars that you kick out on the lead on to one of those tracks, you say?

A. Not in that particular part of the terminal.

Q. And the only reason for having a man is to preserve the equipment or the freight in the cars?

A. When you are placing the cars on the track. Now, if you are shoving a long cut of cars—then——

Q. While ago you said that in a certain part of the yards, on account of gravity, you put a man on the car, and you put a man on the car for the purpose of saving the equipment or the contents of the car?

A. Yes, sir.

Q. That is the only reason?

—. ——.

Redirect examination.

By Mr. CAMPBELL:

Q. It is not necessary to have a man on the car to look out for the brakemen? The brakemen look out for themselves, don't they? Have a lantern there?

A. They do; supposed to take sufficient precaution to protect themselves; safety first; if they wasn't capable of protecting themselves, they wouldn't be suitable employees.

Q. Were you sworn with the other witnesses?
A. I was.
Q. Were you put under the rule and in the witness room there?
A. I was.
182 Q. With the other witnesses?
A. With the other witnesses, and remained with them during the entire afternoon.

By Mr. JONES, for Plaintiff: In view of Mr. Wachter's statement, any objection we had to his being without the rule, the statement is withdrawn; and ask that the jury be instructed that no objection has been made to his testifying as a witness.

By the COURT: The jury is instructed, to give the testimony of this witness such weight as you believe it is entitled to receive, along with other witnesses, according to rules that will be given you governing the weight of evidence.

183 *Testimony of H. Allen.*

H. ALLEN, witness for the defendant, being produced and first duly sworn, testified as follows, to-wit:

Direct examination.

By S. D. CAMPBELL, Esqr.:

Q. State your name to the jury?
A. H. Allen.
Q. Have you been sworn as a witness in this case?
A. Yes, sir.
Q. When did you reach Newport?
A. Why, I come down on number—number Eight——
Q. And you haven't been in the court room until just while ago when you were sworn as a witness and went to the witness room?
A. No, sir.
Q. And I talked to you about this matter?
A. No, sir, I just got in this morning about 10:30.
Q. What is your occupation or employment, Mr. Allen?
A. I am the Assistant Paymaster for the St. L. I. M. & S. Ry. Co.
Q. How long have you occupied that position?
A. About thirteen years.
Q. Mr. Allen, this is a lawsuit about the death of Mr. Tom Craft, or T. Craft, who met with an accident and was killed in the Argents Yards on Feb. 13th, I believe, 1913, Feb. 16, 1913; employed as a brakeman; I hand you what purports to be a pay roll and some checks for his—I hand to you what purports to be a pay roll; please examine that and see whether it is such or not, of employees?
A. Yes, sir, these are the pay rolls, are the brakemen's
184 pay rolls; that is the pay roll which the brakeman signs; and this designates the amount due them and the amount of money and receipt; certain form; those cover certain times; that

is, as paid from these rolls; that is like a designation of what he earned during a certain period.

Q. Now, I hand you a bunch of checks; I wish you would examine those and see if you can identify them.

A. Yes, sir, these are the pay checks that Craft received in payment of this services; these checks are paid to him, and then in the course of time are put through the bank, bearing his indorsement as having received so much money as expressed on the face of it; regular bank; or check paid to order just same as any commercial check, and goes through the bank in the same process.

Q. Now, beginning a year or ten months before Mr. Tom Craft, or Mr. T. Craft met with this accident, I wish you would tell the jury what his earnings and his payments were; tell about those payments—what——

A. I have drawn for this—I have drawn a statement off of these pay rolls here from May 12th to the time of his death; that is ten months; and I find as per the pay rolls and as per these checks which bear his indorsement, and the indorsement of the administrator for the last period of his pay, as it was paid to him, I find that the money actually paid to him was $485.70, or an average—that is the money that was paid to him; that he actually drew; that is an average of $48.57 a month.

Q. An average of what?

185 A. $48.57 a month; that is the money, of course, that was paid to him.

Q. Now, that doesn't express exactly what he earned because the train men have meal tickets which are charged to them and are deducted from their pay and paid to the eating houses where they go; that would make a difference in these figures, of course, as to the actual amount earned by him. A train man is paid by the actual amount of time which he makes; if business is light, his pay is small; if business is heavy, it is not; you can hardly judge by one month, because it fluctuates; he gets paid for the time he puts in; and when he is idle, of course, he doesn't get pay; there is a deduction, of course, 50¢ each month for his hospital fee, which is a benevolent association and which is controlled by the company and their directors; that would make a slight difference, if you wish the actual amount he earned during that time; probably, maybe—Oh, I don't suppose it would make a difference of a dollar or two dollars a month; it might make that difference for deductions, because very few train men ever take more than about ten dollars worth of meal tickets during the month; of course, that is for the time they are away from home; that would make a difference of probably two dollars a month in his average pay; I don't think it would hardly average that; so I think a fair average would be probably fifty or fifty-one dollars which he earned during that period of ten months, which is a pretty good average. Now, the average train man figures that six months' average is a pretty good average because that covers the busy time and the slack time.

186 Q. You would estimate his average earnings then during this ten months at about how much a month?

A. I could figure it out for you if you so desired it, but I think about fifty dollars would be a fair average; I can figure this out for you.

By Mr. CAMPBELL, for Defendant: Now, those are the pay rolls and the checks we submit to Brother Jones (Counsel for plaintiff); and if he wants actual figures on it, we can give it. You can take the witness.

Cross-examination.

By GUSTAVE JONES, Esqr.:

Q. Mr. Allen, Mr. Craft, during the period that you have the record here, cover the record as an extra brakeman?

A. Sir?

Q. Cover it as an extra brakeman?

A. I can't hardly say about that. I can't hardly think so, because an extra brakeman would hardly hold a period of ten months.

Q. Assuming that he was an extra brakeman during that period, have you a record now as to what he earned as a regular brakeman on the White River Division?

A. No, sir, we have no record of that.

Q. Well, you have in the office, haven't you?

A. I presume we have; we have a record of all——

Q. Now, Mr. Allen, you say you have been engaged in your present employment about thirteen years?

A. Yes, sir.

Q. Then you have familiarized yourself with the pay of
187 the employees in the various departments that you have their payrolls for?

A. Yes, sir.

Q. Now, based upon that knowledge and information and experience, can you say what the average of the regular brakeman is?

A. Well, that is kind of a yard——

Q. I say, can you say it from what you have observed from your knowledge of the payroll and experience had with them during the thirteen years?

A. You see, there are various runs on a train; there are the men that have the seniority—don't know whether the jury will understand——

Q. That means the oldest in point of service?

A. The oldest in point of service; of course, they have the choice of runs and are steadily employed all the time; there are not so many of those runs, of course; they make their pay steadily; it is almost the same as if they were paid a stated salary because they have those preferred runs and it is their option to take a train out whether anybody else goes out or not. And as it goes down the line, so that a regular train man, just like it is now, so that that there are conductors that are drawing a brakeman's pay now. So to judge what a regular brakeman's pay would be, unless he was up at the top of the line, it is kind of inconsistent question to ask.

Q. Say he was up at the top of the line?

A. He ought to average somewhere between seventy-five
188 and eighty dollars a month; that is, if he was a man that was on the preferred list.

Q. Wouldn't go as high as a hundred?

A. No, sir, hardly; that would be an exception.

Q. Sir?

A. No, sir, not according to the Interstate Commerce laws; that would be an exception.

Q. They do make it?

A. They do in case of rare occasions, wreck train or something; but that is not an average salary.

Q. You said while ago based on running time; do you pay them by the mile?

A. Yes, sir, we pay them by the mile; that is, freight; if this man was employed as brakeman——

Q. How much a mile?

A. I really couldn't explain that to you because that is superintendent's service.

Q. All you get is what they turn into you, and you make out the pay according to those reports?

A. Yes, sir, we pay what is turned over to us to pay.

Q. What does a conductor get?

Defendant Objects.

By the COURT: On the ground that the deceased was in line of promotion?

By Mr. JONES, for Plaintiff: Yes, sir.

By Mr. CAMPBELL, for Defendant: We object to it, and also on the ground that it is no cross examination.

By Mr. JONES, for Plaintiff: We make him our witness for that purpose.

By Mr. CAMPBELL, for Defendant: I am objecting to it then when you make him your witness.

189 By the COURT: That evidence was given by Mr. Craft, wasn't it?

Defendant objects and excepts to the foregoing remark of the Court.

By Mr. CAMPBELL, for Defendant: And I am objecting to the remark of the court, in the presence of the jury, about that testimony being given by Mr. *Carft*.

By the COURT: Why?

By Mr. CAMPBELL, for Defendant: Because in the first place if Mr. Craft did give such testimony, we think it was incompetent. In the second place, we don't think Mr. Craft did give any competent testimony relative to that. And the third place, that remark in the presence of the jury would be an indication to the jury that such was the testimony of Mr. Craft, and competent testimony.

By the COURT: Note the exceptions.

By Mr. CAMPBELL, for Defendant: And ask the court to instruct the jury that the question is improper, too.

The Court refused to so instruct the jury as requested, whereupon the defendant at the time duly saved its exceptions thereto.

Q. Do you know what the freight conductors on the Iron Mountain Railroad earn?

Defendant Objects: Overruled: Exceptions.

Q. Do you know that?
By the COURT: You can answer that yes, or no.
A. No, sir, I couldn't tell you that without examining the payrolls.
Q. Couldn't tell?
A. No, sir, couldn't tell you that from memory.
Q. Do you know, Mr. Allen, that this record is the earnings for the ten months, of the deceased Tom Craft?
A. Yes, sir; that is, according to our records.
Q. That is just all you know about it, is what was reported to you by somebody else?
A. Well, those payrolls are supposed to be a correct method.
190 Q. I say, the way you make them up, you just get a report from the time-keeper, train master or superintendent?
A. That is really kind of a misleading question.
Q. Well, I don't intend to mislead you.
A. I know you don't, but I say my answer might be misleading answer, to tell you the truth about the matter.
Q. You stay in St. Louis in the office, don't you?
A. Yes, sir.
Q. And you have certain clerks working under you, don't you?
A. Yes, sir.
Q. These are handed to you when you go out on the pay car, or when you go to make up the mailing list for the checks?
A. Yes, sir.
Q. That is all you know about them, isn't it?
A. Yes, sir, and that is——
Q. Got nothing to do——

By Mr. CAMPBELL, for Defendant: Let the witness answer.

Q. You have nothing to do with comparing these; I hand you one of these purported pay rolls; now, you had nothing to do with comparing that, had you?
A. No, sir.
Q. That was done by some clerk in the office?
A. Yes, sir.
Q. And then passed to your desk?
A. Yes, sir.
Q. And from that you made up the checks?
A. No, sir, we get the checks already made up.
Q. And then you either deliver that when you got out on the pay car—do you use the pay car now?

191 A. They do at certain points.

Q. And if you don't use the pay car, you mail the checks to certain points, do you?

A. Yes, sir.

Q. That information from which this payroll is compiled is furnished from some person other than a clerk in your office?

A. Yes, sir.

Q. And by the time you get it, it is about the third hand, isn't it?

A. Well, yes, you might say so.

Q. Now, do you know whether Mr. Craft, Tom Craft, did anything else besides the work you testified to here for the ten months you have the record of?

A. No, sir.

Q. You do not.

A. No, sir.

Q. Now, this compilation for the ten months is from May to what time?

A. From May to the time of his death?

Q. From May to February?

A. Yes, from May 12th to, you might say, March 1st; that includes the time of his death.

Q. That includes the money he had earned from the first to the sixteenth of February?

A. Yes, sir.

Q. Let's see how much was that, that last period, from the first to the sixteenth of February, from the first of February to the sixteenth of February?

192 A. He made $50.70.

Q. Now, Mr. Allen, you haven't your memoranda prior to May, have you?

A. No, sir.

Q. Now, do you know what the business was of the road on which Craft worked *on* February, from May, 1912, to February, 1913, as compared with February, 1911, to May 1912?

Defendant Objects.

Q. I asked him if he knew.

By Mr. CAMPBELL, for Defendant: It is immaterial whether he knows or whether he doesn't know.

By the COURT: Answer the question.

Defendant excepts to the foregoing ruling of the Court.

Q. Do you know or do you not know?

Defendant Objects.

A. As I understand it, you want to know if I know from the earning capacity of this man, or from the tonnage of the road, the business of the road.

Q. That is what I want to know, from the business of the road, do you know it.

A. No, sir, I couldn't tell that; that is without my province as to the earnings of the road; that is something——

Q. I thought you said — while ago the earning- of the men depended upon the traffic?

A. No, you misunderstood me; I said the men's pay depends on the number of trains run.

Q. Then the number of trains run depend on the amount of business?

A. Yes. I think, according to my estimation and knowledge of the payrolls, and that is a very fair average of what a man
193 would earn in his capacity and the way he was employed; that is a very fair average; because a train man does not work regularly; whether he works steady or not; he will take a lay-off or lay off for two or three days; very few train men that work steady, or very few in railroad employment. With your permission, I would like to make a little statement; you were asking me as to those payrolls; I would state that those payrolls are made in the superintendent's office and certified to by the superintendent as being a correct statement of the man's——

Q. And then sent by the Superintendent to your office?

A. To the Auditor's office, who audits them and compares them and sees that the signatures are correct.

Q. Just about what you said awhile ago, come to you about third hand?

A. Yes, sir; in other words, when they come to you, supposed to be correct, audited and checked?

Q. We are not asking anything about that.

A. Would state that those papers——

Q. I am just making the point that these papers were not kept by you; you are not the bookkeeper?

A. No, still these are——

Redirect examination.

By Mr. S. D. CAMPBELL:

Q. Now, Mr. Allen, you know that there was no other pay sent out from the railroad company to Mr. T. Craft except as reflected by the payrolls, do you?

A. No other pay sent out except as appears on the pay rolls?

Q. Yes, sir, except as appears on the pay rolls, you have
194 no knowledge?

A. No, to the best of my knowledge, no, sir. The pay rolls represent what was paid him; any earnings a man makes necessarily appears on the pay rolls; it has to.

Q. Now, some of these checks—for instance, there is a check that is of date Dec. 16, 1912, for $34.40, that has some punch marks on it, or in it; there is another check of date June 17, 1912, for $27.05, that has some punch marks in it. I wish you would explain what those mean; I hand them to you.

A. May I look at one of those other checks?

Q. Yes, sir.

A. I just want to see where these checks are cashed; these checks are cashed by the Arkansas Bank & Trust Company at Newport, Ark. I suppose that those are simply the cancellation of the checks by the bank; their own cancellation to stop the checks; they made them—that was a check which was cashed here by the Arkansas Bank & Trust Company at Newport; it was cleared through the Boatmen's Bank at St. Louis, which is one of our banks, and came to us cancelled. That, in all probability, is nothing but the cancellation of the check, that it has been paid. These clips here in all the checks, when they come to our office and have been checked back, that the checks have been paid to the right amount; no error whatever in paying the check; the auditor's check to show that check has been cancelled and filed away for reference. But those dots are simply a cancellation mark of the check; that is, that the check has been
195 paid; this is our own clip here, and these in all probability simply the check of the bank that the check has been cancelled or paid.

Q. Now, the clips that you mention, that appears in all these checks, indicates what?

A. That the check has been cancelled and cancels the check of the auditor, which shows that the check is finished and done with and cannot be used again in any manner whatever; simply as if a man would take a personal check and clip it out. If that check has been to the bank with that clip on it, that clip shows that the signature is void; of course, the signature is virtually cut out. But those stamps there on those checks, those stamps are simply the stamps and punches used by the banks in clearing of the check from the point where it was originally paid to where it comes back to us.

Q. Then, as an approximate calculation, would you say, Mr. Allen, that Mr. T. Craft's wages as paid by the Railroad Company would be something like fifty dollars a month?

A. Yes, sir.

Q. For the ten months prior to the date of the accident.

—. ——.

Recross-examination.

By Mr. JONES:

Q. You didn't mean for the jury to get the impression from your testimony that Mr. Craft would live on $2.00 a month for eats, did you?

A. Oh, no; no; no; no; no; no, I didn't mean that; I will explain that.

Q. There is another matter, Mr. Allen.

196 By DEFENDANT'S COUNSEL: Well, let him explain that, if you will.

A. I was just simply going to say, of course, that is virtually the payment of a meal ticket; a man might go into Little Rock and go to the Young Man's Christian Association and pay so much for a meal ticket.

Q. That wouldn't go through your pay roll?
A. Oh, yes; there is a deduction; he goes there and buys a ticket and that entitles him to so many meals.
Q. Does it ever happen that a mistake is made as to the pay of an employee?
A. Yes, sir.
Q. Does it ever happen that you don't pay them enough?
A. Oh, yes, sir.
Q. How do you handle that, when it is satisfactorily shown that you don't pay him enough pay?
A. It is brought into the trainmen's agreement, which I suppose Craft belonged to; or they—it is his privilege to go in to the Superintendent's office and check over his time with the time-keeper; and that is rectified immediately.
Q. How is that paid?
A. Sometimes carried over into the next pay time; pay twice a month in Arkansas, as you are aware of.
Q. And that wouldn't appear on the pay rool?
A. Yes, sir, every amount of money that is paid to a man for service of the railroad is shown on the pay roll in some form or other.
Q. It wouldn't show on those pay rolls?
A. Yes, sir; no matter what money earns in any capacity
197 from the railroad company, that has to appear on the pay roll.
Q. If, for instance, suppose a man had pay coming to him for the first period of the month, say from the first to the sixteenth?
A. Yes, sir.
Q. And that he had earned $35.00 but his time went in for only $30.00; then, as I understand it, you would carry that $5.00 over on the second period pay roll and clean it up?
A. Yes, sir.
Q. Suppose he quit the service of the company in the meantime?
A. That would go on just the same.
Q. Wouldn't you send his check to the agent where he was, or send it to him himself?
A. We send pay checks to a man wherever he is, all over the United States; we do that perpetually; and up in Canada.
Q. Then that wouldn't appear on the pay roll on either one of those periods, would it?
A. Yes, sir.
Q. If you didn't pay him until the second period?
A. Yes, sir; I pay men every day; men, as high as ten years old; it is out-lawed, but we keep a record of it; we go back, and if there is anything due him we send it to him.
Q. How could you cover that on those pay rolls, if you hadn't changed them up?
A. How would you cover that?
Q. Yes.
198 A. Well, if I understood you right, suppose a man earns so much money in this month of February; suppose the last period of the month, say in some oversight or misplacing his time slip, or failure to send in his time slip, and that would be too late

to get on this month's pay rolls. If I understand, you want to know how that would be carried?

Q. Yes.

A. It would probably be carried on the first of March period, on the first succeeding pay roll after that error is discovered.

Q. Now, do you get up a separate sheet to cover that pay roll under those conditions?

A. No, sir.

Q. For example, you know what the law is, in case a man is discharged, you have to settle with him in seven days, don't you?,

A. Yes, sir, with certain restrictions.

Q. That is, if he notifies you to send his check to a certain place?

A. Yes, sir.

Q. Those don't appear on the pay roll, would they?

A. The penalty, you mean?

Q. Don't mean the penalty.

A. We pay no money from our office except something on the pay roll to show for it.

Q. Did you go behind May, 1912, for this man's pay?

A. No, sir.

Q. You did not?

199 A. No, sir.

Q. He was in the employ of the company prior to that time?

A. I couldn't state, sir.

Redirect examination.

By Mr. S. D. CAMPBELL:

Q. Mr. Allen, I believe that is all, unless there was something where you were cut off in making some explanation something about this.

200 *Testimony of W. B. Robinson.*

W. B. ROBINSON, witness for the defendant, being produced and first duly sworn, testified as follows, to-wit:

Direct examination.

By S. D. CAMPBELL, Esqr.:

Q. State your name to the jury?

A. W. B. Robinson.

Q. What is your occupation?

A. Cashier for the Iron Mountain.

Q. How long have you been working for the Iron Mountain?

A. Seventeen years.

Q. Did you witness Mr. Tom Craft's, or T. Craft's signature on the pay roll, or have anything to do with the pay rolls along about or prior to Feb. 16, 1913?

A. Yes, sir, I delivered him a few cgecks and witnessed his signature on the rolls to the checks.

Q. What do you do about these pay rolls, as to employees?
A. They are made up in the paymaster's office and sent here, and the checks are delivered to the various employees to whom they are made out.
Q. Look at this, please, and refresh your memory and see whether or not you have witnessed his signatures on the pay rolls?
A. Yes, sir, I have.
Q. Turn to the places where you have witnessed his signature to it?
A. I was just turning through; I see four here that I witnessed.
Q. Give the dates to the jury when you did that?
201 A. I can't give the dates the checks were delivered him; I can only tell you the period the rolls were for.
Q. State that to the jury.
A. This one here was for the first period of August, 1912.
Q. How much was that?
A. $30.85.
Q. For what time?
A. For the first period of August, 1912.
Q. What do you mean by the first period of August?
A. First fifteen days; the railroads pay off twice a month now, for the first fifteen days and the latter half.
Q. The next one that you witnessed?
A. The next one was for the second period of August, 1912.
Q. How much was that?
A. $33.95.
Q. Well, the next one you witnessed?
A. Was for the first period of September, 1912.
Q. How much was that for?
A. The third one was for the first period of September, 1912; the amount was $30.10.
Q. For the first period?
A. Yes, sir.
Q. $30.10.
A. Yes, sir.
Q. The next period of September, how is that?
A. The next one that I have witnessed I find here is for the first period of July.
Q. How much is that?
202 A. $21.80.
Q. $21.80?
A. Yes, sir. That is all I notice that I witnessed here, the four.
Q. I hand you a bunch of checks; you can state, unless they want you to go in detail about it, I wish you would just run through those just—Are you familiar with the ordinary course of business as to those checks coming, and what they mean—those checks there?
A. Yes, sir, I know what they mean.
Q. State to the jury whether or not he got his money as indicated there and as represented on those checks?
A. Well, now, the checks, you know, were only delivered by me;

I never cashed any of the checks; I never paid him the money on the checks.

Q. What do you do?

A. Just take their signature on the pay roll and deliver him the checks.

Q. Did you deliver those checks?

A. Yes, sir; no, I didn't deliver all of those; only the four that I mentioned.

Q. The four that you mentioned?

A. The four that I witnessed the signature there.

Q. There are two of those checks there that are punched; where are these checks usually paid, do you know?

A. No; they are negotiable, they are payable anywhere.

Q. This check of date Dec. 16, 1912, for $34.40; examine that and see what is that?

203 A. Why, it is just a check for $34.40; pay to the order of T. Craft.

Q. What are those punch marks on that?

A. I couldn't say; that is done after they are delivered by me; after they leave our hands.

Q. Do they make any initials, any letters, those punch marks?

A. Yes, sir, that is "P D."

Q. But that is what the bank did without your knowledge? That is just the appearance of it?

A. Yes, sir, it was done after it was delivered by me to the owner.

Q. Some bank did that?

A. Evidently, yes, sir.

Q. Not the railroad company?

A. No, sir, it wasn't done by us.

Q. Here is another one that has some punch marks; what is that?

A. That is the same as the other, "P D."

Q. And on that is there a punch mark missing there on that? Compare those two, "P D."

A. No.

Q. Did the railroad company have anything to do with those punch marks on either of those two checks in the course of business, or was that in the banking business.

A. Well, as to that I can't say; they weren't in there when they were delivered by me to the man they belonged to; whether some bank punched them in there, or whether they were mutilated

204 after received back by the Railroad Company, I can't say; but they were not mutilated when delivered to the owner by me.

205 *Testimony of H. E. Silcox.*

H. E. SILCOX, witness for the defendant, being produced and first duly sworn, testified as follows, to-wit:

Direct examination.

By S. D. CAMPBELL, Esqr.:

Q. Have you been sworn, Mr. Silcox?
A. Yes, sir.
Q. What are your initials?
A. H. E.
Q. H. E. Silcox?
A. Yes, sir, Silcox.
Q. What is your occupation?
A. Civil engineer for the Iron Mountain.
Q. How long have you been in that employment?
A. About five years.
Q. Did you ever graduate from any civil engineering school or department?
A. Yes, sir.
Q. Where?
A. Michigan Agricultural College.
Q. How long have you been pursuing that occupation, civil engineer?
A. Five years.
Q. Are you acquainted with the tracks in Argenta?
A. Yes, sir.
Q. I hand you what purports to be a map of the tracks there; wish you would examine it and see, tell the jury what you have to
206 say about it. I hand you this paper that I ask to be made Exhibit "A" to your testimony; examine that and tell the jury what it is. (Map is attached as Exhibit "A".)
A. This is a map showing the lay out of the yard tracks at the north end of Argenta yard in immediately south of the passenger station and what is known as the yard office; and the tracks are numbered from the main line out; that is, the one next to the main line is numbered 2, 3, 4, 5, and 6, and so on out; now, here is track No. 4, is colored in yellow; track No. 5 in red; and track No. 6 in purple; and at the north end of No. 5, which is shown in red, and the north end of No. 6, shown in purple, are the switches of the respective tracks; that is where the tracks turn out from the main lead; and at a distance of fifty feet back of the switch to No. 6, or the switch of No. 6, the track centers are eleven foot and 3/10; that is from the center of one track to the center of the other is elev-n and 3/10 feet; one hundred feet back it is 11 8/10 feet; and one hundred and fifty feet back it is 12 and 2/10 feet.
Q. Does that map show those measurements on there?
A. Yes, sir.

By DEFENDANT'S COUNSEL: Now, we introduce this in evidence as Exhibit "A" to the witness's testimony.

Cross-examination.

By GUSTAVE JONES, Esqr.:

Q. Did you make that map?
A. I checked these tracks over.
Q. Did you make that map?
A. No, sir, not this one.
207 Q. Did you make the survey from which the map was compiled?
A. No, sir.
Q. Do you know when Tom Craft was killed?
A. I don't know——
Q. Do you know?
A. No, sir, not the exact date.
Q. On the 16th of February, 1913, can you tell the jury whether that was the condition of that yard or not?
A. Yes, sir; no change been made in there since that time.
Q. How do you know?
A. I have been over it time and time again.
Q. You didn't make the map?
A. No, sir.
Q. You didn't make the measurements?
A. Yes, sir, I made the measurements that are indicated in black ink.
Q. You made the measurements?
A. Yes, sir.
Q. Put them on the map?
A. Yes, sir.
Q. And you would say that was a fairly correct representation?
A. Yes, sir.
Q. What is the distance from the center of the track to the end of the tie?
A. Four feet.
Q. Then the greatest width you have there, from one hundred fifty feet back on Track No. 6, between tracks 5 and 6, is twelve feet and how much?
208 A. Twelve foot and 2/10.
Q. From center to center?
A. Yes, sir.
Q. Then from the 12.2, which is from center to center, the distance from center of the track to end of the tie is how much?
A. Four feet.
Q. Would leave——
A. Would leave four and 2/10 feet between the ends of the ties.
Q. Were you in the yards on the 16th of February, 1913?
A. No, sir.
Q. You were not?
A. No.
Q. Then how can you tell that map is like they were then?
A. Well, I was in there prior to that time.

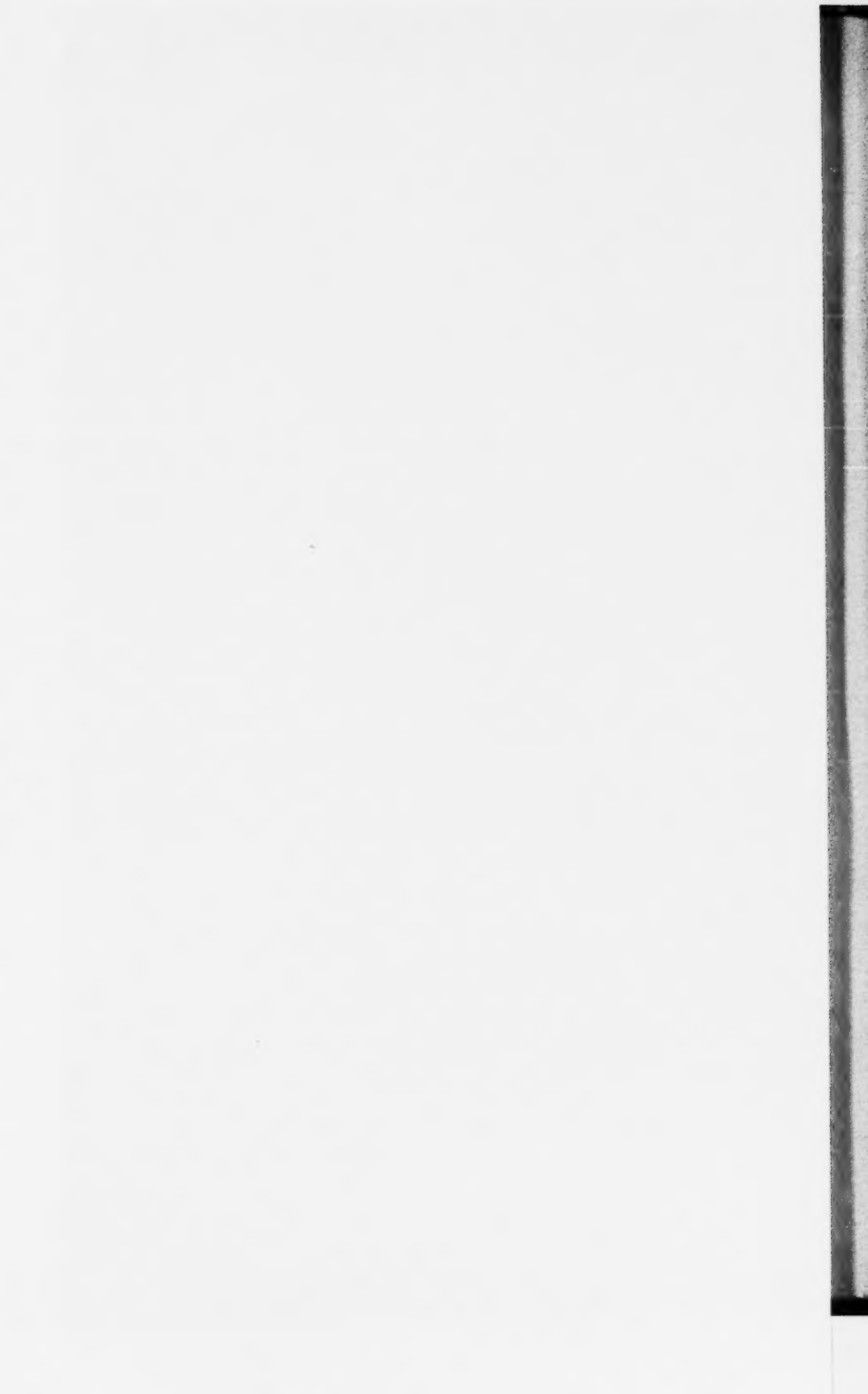
MAPS

TOO

LARGE

FOR

FILMING



Q. And since that time?
A. Yes, sir.
Q. Do you know how far it is from the outside ball of the rail to the outside edge of a boxcar?

Defendant Objects.
Overruled.
Exceptions.

Q. I asked him if he knew how far it was from the outer edge of the ball of the rail to the outer edge of a box car that might be standing on the rail.

By the COURT: Of any boxcar?

A. Yes, sir, or a coal car. Do you know the dimensions of a coal car?
A. Yes, sir.

209 By PLAINTIFF'S COUNSEL: We won't ask him any further questions.
By the COURT: Let the map be introduced. (Same is attached as Exhibit "A" to testimony of witness H. E. Silcox.)
Defendant rests.

(Here follows blue print, marked page 210.)

The plaintiff introduced the following witnesses and testimony in rebuttal, to-wit:

211 *Testimony of A. J. Speer in Rebuttal.*

A. J. SPEER, witness for plaintiff, being recalled by plaintiff, testified in rebuttal as follows, to-wit:

Direct examination.

By GUSTAVE JONES, Esqr.:

Q. Mr. Speer, I believe you said that you were train conductor, freight train conductor?
A. Yes, sir.
Q. How long have you been acting in that capacity?
A. Well, I was promoted in February, 1906, I believe it was.
Q. Promoted from what?
A. From Brakeman.

By Mr. CAMPBELL, for Defendant: Defendant objects, and asks the court to tell the jury that is incompetent evidence and not rebuttal; ask the court to tell the jury that is not competent.

By Mr. JONES, for Plaintiff: I understand it is not rebuttal but as I understand the rule it is in the discretion of the court.

Defendant duly objected, separately, to the foregoing question and answer; and requested the court to exclude said answer from the jury; but the court overruled each of said objections and refused to exclude said answer; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Mr. Speer, do you know what the average earnings of a brakeman, freight brakeman, are on this division of the Iron Mountain Railroad?

Defendant Objects.

By the COURT: That is rebuttal, Mr. Campbell; overruled.

Defendant duly saved its exceptions to the action of the
212 court in overruling its objections to the foregoing question; and also saved its exceptions to the foregoing remark of the court.

A. Well, you mean the average?
Q. Yes?
A. The average regular brakeman?
Q. Yes, sir?
A. Would, I suppose average month the year round, probably ninety dollars; some months has more working days and some has less.

Defendant duly objected to foregoing answer; and requested the court to exclude same from the jury; but the court overruled said objections and refused to exclude said answer; whereupon the defendant at the time duly saved its exceptions thereto.

Q. Now then, what are the average earnings of a conductor, freight conductor on this——

Defendant objects.

Q. Is the pay of a freight train man, brakeman, by the mile?
A. Yes, sir.
Q. How much is the average per mile?
A. $4.18 per hundred for a conductor.
Q. For a brakeman, though?
A. $2.78 for a brakeman.

By DEFENDANT'S COUNSEL: Wait a minute, for a conductor, I object to that and ask the court to instruct the jury to disregard it.
By the COURT: The statement of the witness as to the pay of a conductor per mile is not evidence.

Q. For a freight brakeman you mean $2.78.
A. Per hundred.
Q. Per hundred miles?
A. Yes, sir.

213 Plaintiff states that if permitted to answer the question witness would say that the average earnings of a freight conductor are $4.18 per hundred miles; and if he worked regularly by the month it would be thirty times that.

Cross-examination.

By S. D. CAMPBELL, Esqr.:

Q. Mr. Speer, the deceased, Mr. Tom Craft, was an extra brakeman, I believe, wasn't he?
A. Yes, sir, he worked for me different times.
Q. Not a regular brakeman?
A. No, sir.
Q. But just an extra brakeman; and he would just be called in at times when you would want to supply the place of a regular brakeman?
A. Or put on emergency crew, something.
Q. Yes, something of that kind; just be called in.

Redirect examination.

By Mr. JONES:

Q. Of course, that wasn't anything in cross examination that we asked; but since he has asked that question, we will ask you if extra brakemen, when business is good, don't work pretty regularly.

Defendant objects.

Q. Or how much time does an extra brakeman put in?

Defendant Objects.

Q. Do you know?

Defendant Objects.

A. Well, that varies on the conditions.

Defendant Objects.

Q. Conditions may vary?

Defendant Objects.

214 Defendant duly objected, separately and severally, to each of the foregoing four questions and two answers; and requested the court to exclude each of said answers; but the court overruled each of said objections and refused to exclude either of said answers; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally and in each instance.

Q. Did you ever know whether an extra brakeman has put in more time than a regular brakeman?

Defendant Objects: Sustained.

215 *Testimony of H. E. Silcox in Rebuttal.*

H. E. SILCOX, witness recalled by the plaintiff in rebuttal, testified as follows, to-wit:

Direct examination.

By GUSTAVE JONES, Esqr.:

Q. Mr. Silcox, you are the same gentleman that testified while ago?

A. Yes, sir.

Q. As being a civil engineer in the employ of the defendant company?

A. Yes, sir.

Q. Do you know the dimensions of a coal car in ordinary use of the Iron Mountain Railroad?

A. Yes, sir.

Q. Now, do you know the distance from the ball of the rail, outer rail, outside rail, or the outer edge of the rail, I should say, what it would be to the outside edge of one of those boxcars that happened to be standing on that rail?

Defendant objects: Overruled: Exceptions.

Q. Coal car, I mean.

—. ——.

Q. Well, I can get at it in a different way; do you know what the width of the ordinary coal car in use is?

Defendant objects.

A. About nine feet, from out to out.

Defendant Objects.

Q. From the outer wall to outer wall?

Defendant Objects.

A. Yes, sir, that is the outside dimensions.

Defendant Objects.

Q. Now, taking the outside or side of the coal car, and if it were extended to the ground underneath it, how far would that be
216 from the rail, if you extend that wall to the ground?

Defendant Objects.

A. It would be four and a half; would be half on one side—about two and 2/10 feet.

Defendant Objects.

Q. Then you would say about twenty——

Defendant Objects.

A. That would be about twenty-six inches.

Defendant duly objected, separately and severally, to each of the foregoing four questions and four answers; and requested the court to exclude from the jury each of said answers; but the court overruled each of said objections and refused to exclude any of said objections; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Q. Now, do you know the dimensions of the ordinary boxcar?
A. They are about the same.
Q. And then it would be the same distance then from the——
A. Yes, sir, exactly.
Q. How far do the ties extend from the ball of the rail, say?
A. Would be one and 7/10—oh, about a foot and, about one foot eight inches.
Q. What is the distance between the rails on track Six?
A. In track six, you mean between five and six?
Q. No, sir, between the rails; what is the width of track six?
A. Four feet, eight and a half inches.
Q. Is that between the rails?
A. Yes, sir.
Q. Measured from the inside of the rail?
A. Yes, sir, standard *guage*.
Q. Now, what is the width?
A. Four foot, eight and a half inches.
217 Q. And what is the width of the top of the rail?
A. Well, it is about an inch and a half to two inches; varies with the rail.

Cross-examination.

By S. D. CAMPBELL, Esqr.:

Q. You were talking about the width between the rails of the track?
A. Yes, sir.
Q. But not talking about, when you said that, as to the difference from center to center of two different railroad tracks?

A. Well, from center to center of two different railroad tracks, we mean half way between the rails of that track to a point half way between the rails of the other track; that is the distance between the two tracks.

Q. And that distance between the two different tracks was how much?

A. Was twelve foot and 2/10.

Q. That was the distance at one hundred fifty feet from the lead?

A. Yes, sir.

Q. And at a hundred feet from the lead was how much?

A. Let's see, have you got that blue print there? It was eleven and 8/10.

Both sides rest.

The foregoing was all the evidence introduced in this case.

At the conclusion of all the evidence, the defendant requested the court to instruct the jury peremptorily to return a verdict
218 for defendant; which the court refused to do; whereupon the defendant at the time duly saved its exceptions thereto.

Instructions Requested by Plaintiff.

Thereupon, the plaintiff requested the court to give to the jury each of the following instructions, numbered respectively as follows, to-wit:

1.

It is the duty of all persons running trains in this State upon any railroad to keep a constant lookout for persons and property upon the track, and if any person or property shall be killed or injured by the neglect of any employees of any railroad to keep such loo-out, the company owning and operating such railroad shall be liable to the person injured for all damages resulting from neglect to keep such lookout.

2.

It was the duty of defendant company to exercise ordinary care to provide a reasonably safe place for the deceased to work and to use ordinary care to keep the place reasonably safe.

3.

If you believe from a preponderance of the evidence that the injury inflicted upon the deceased by said car caused his death, and that the employees of defendant were negligent in failing to give any warning to the deceased of said car's approach in time for him, by the exercise of ordinary care, to have avoided the injury,
219 and that such failure, if any, caused said injury, then your verdict should be for the plaintiff.

4.

If you find from a preponderance of the evidence that the defendant railway company negligently ran its car upon the deceased and injured him, but further find that deceased by his own negligence contributed to his injury, then the amount of damages sustained by reason of defendant's negligence should be reduced to correspond with or in proportion to such negligence of deceased in contributing to his injury.

5.

If the defendant railway company negligently ran its car over and injured deceased, then the fact that the deceased may have been negligent and by such negligence contributed to his injury does not prevent or bar a recovery by the plaintiff in this action.

6.

If you believe from the evidence that it was necessary for the deceased in the performance of his duties to walk along the way between tracks No. 5 and 6, then it was the duty of the defendant to use ordinary care to avoid injuring deceased in the performance of his duty.

220

9.

If you find for the plaintiff, you will award such damages as may have been sustained by the deceased for the pain and suffering, if any, endured by him as a result of the injury, which amount is for the benefit of the estate of the deceased, to be recovered by the administrator; and you may also award such further sum as you may find from the evidence the deceased would have contributed to his father's support, if any during his father's expectancy.

10.

In passing upon the question as to whether the deceased would have continued to contribute to his father's support had he lived, you may take into consideration his ability to continue such contribution, the probability of his continued employment, making it possible for him to make such contribution, and whether from the facts and circumstances proven in this case it is reasonably probable that such contributions would have been continued by him.

Defendant duly objected, separately and severally and in each separate instance, to each of plaintiff's said requested instructions which are numbered respectively as 1, 2, 3, 4, 5, 6, 9 and 10; but the court overruled each of defendant's objections to each of said instructions, and gave each of said instructions to the jury, as set out hereinabove; whereupon the defendant at the time duly saved its excep-

tions thereto, separately and severally, and in each separate in-
221 stance as to the giving of each of said instructions.

Thereupon, the defendant requested the court to give to the jury each of the following instructions, numbered respectively as follows, to-wit:

Instructions Requested by Defendant.

1.

You are instructed to return a verdict for the defendant.

2.

Under the law governing this case, there cannot be any recovery on account of pain or suffering endured by the deceased.

3.

There is no evidence to show that the deceased endured any conscious pain or suffering after the accident, and there cannot be any recovery on account of pain or suffering.

4.

Even if you should find for the plaintiff, as to the contributions testified to in this case you should estimate upon the evidence only such amounts of money as were actually contributed to J. T. Craft by the deceased; and as to this matter the burden of proof is upon the plaintiff to show by a preponderance of the evidence actual amounts contributed to him.

5.

The plaintiff, J. T. Craft, being fifty-three years of age
222 or more, and the deceased at the time of his death being over the age of twenty-one years, there is no presumption that the deceased would have contributed any amounts of money to his father; but on the contrary the presumption is that whatever earning that may have been made by the said Tom Craft, deceased, would have been used by him and not have been given to the said J. T. Craft.

6.

Any testimony as to contributions from the deceased, Tom Craft, to his father, which comes from the testimony of the administrator J. T. Craft, should be disregarded by you and should not be considered.

7.

Any testimony that has been offered by the plaintiff as to pain and suffering upon the part of the deceased should be disregarded by you.

8.

Any testimony that has been offered by the plaintiff as to pain and suffering upon the part of the deceased should be disregarded by you unless you believe from a preponderance of the evidence that the deceased was engaged in inter-state commerce in his employment.

9.

The deceased, Tom Craft, in accepting the employment in which he was engaged accepted and took all the hazards and risks
223 reasonably incident to such employment; and if you believe from the evidence that the accident occurred in the ordinary and reasonable course of such employment then the defendant railway company would not be liable therefor.

10.

If the deceased Craft was negligent as an employee of the Railway Company in any manner or degree, and if such negligence contributed directly or proximately to his death, then the plaintiff cannot recover.

11.

The law does not weigh or measure any difference in degree as to negligence on the part of the deceased and negligence on the part of the defendant; and if you believe from the evidence that the deceased was negligent in any manner or degree contributing proximately to his death, then your verdict should be for the defendant, no matter how great you might believe there was negligence on the part of the defendant.

12.

The deceased, Tom Craft, being a brakeman in the employ of the defendant, the St. Louis, Iron Mountain & Southern Railway Company with such knowledge as he might have in such employment or otherwise, should under all the circumstances have used due care and caution as appeared to him reasonable at the time to avoid being struck by the car in question; and if he, under such circumstances as would appear to a reasonably prudent person in his em-
224 ployment, failed to do so, then there can be recovery in this case.

13.

If the deceased, Tom Craft, had a reasonable opportunity to know, under all of the circumstances currounding, that it would be dangerous for him to cross the track where the car was being put down or being kicked down, and failed under the circumstances to exercise his knowledge and experience, then the plaintiff cannot recover.

14.

The mere fact that there were knuckles and brake shoe beams in the yards at Argenta would not constitute negligence upon the part of the defendant railway company.

15.

The defendant Railway Company had the right to have in its yards knuckles and brake shoe beams to be used in its business; and merely having such articles there would constitute no negligence upon the part of the defendant.

16.

The defendant Railway Company had the right to move the cars in the yards at Argenta in the usual and customary manner of doing such work; and there would be no negligence upon its part in so doing.

225 17.

There is no negligence upon the part of the defendant from the mere fact that there may have been no lights or a person upon the coal car in question while being switched in the yards in Argenta.

The court gave to the jury each of defendant's said requested instructions which are numbered respectively as 4 and 14.

But the court refused to give to the jury each of defendant's said requested instructions which are numbered respectively as 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16 and 17. Whereupon the defendant at the time duly saved its exceptions to such actions of the court, separately and severally, and in each separate instance as to the refusal to give each of said instructions.

Thereupon the court modified defendant's requested instruction No. 9, (over defendant's objections) so that the same would read as follows, to-wit:

9, As Modified (Court's No. 7).

The deceased, Tom Craft, in accepting the employment in which he was engaged accepted and took all the hazards and risks reasonably incident to such employment; and if you believe from the evidence that the accident occurred in the ordinary and reasonable course of such employment and without any negligence upon the part of the defendant, then the defendant railway company would not be liable.

Defendant duly saved its exceptions to the modification of said instruction; and duly objected to the same being given to
226 the jury in such m-dified form; but the court overruled said objections and gave said instruction to the jury as

modified; whereupon the defendant at the time duly saved its exceptions to such action of the court.

By the COURT: Any further instructions.

By Mr. CAMPBELL, for Defendant: Yes, sir. Defendant asks the court to instruct the jury that there is no presumption of negligence on the part of the defendant from any of the transactions that have been detailed in evidence; but the burden of proof is upon the plaintiff to establish every element of his case.

The Court refused to instruct the jury as requested by defendant next hereinabove; whereupon the defendant at the time duly saved its exceptions to such refusal of the court to so instruct the jury.

Thereupon, Mr. Lon Campbell, one of plaintiff's attorneys, made the opening argument to the jury in this case in behalf of the plaintiff; and, immediately following, Mr. S. D. Campbell, attorney for the defendant, made the argument to the jury in this case in behalf of the defendant.

Thereupon the court withdrew from the jury the instruction which had heretofore been given to the jury, which is identified as defendant's requested instruction No. 4; and the court stated:

Gentlemen of the jury, I read to you the following instruction in giving you my general instructions:

227 (Defendant's Requested Instruction No. 4.)

"Even if you should find for the plaintiff, as to the contributions testified to in this case you should estimate upon the evidence only such amounts of money as were actually contributed to J. T. Craft by the deceased; and as to this matter the burden of proof is upon the plaintiff to show by a preponderance of the evidence actual amounts contributed to him.

That instruction is withdrawn from you and is not the law in this case.

Defendant at the time duly saved its exceptions to such action of the court in withdrawing said instruction No. 4 from the jury and in refusing to permit the jury to consider said instruction.

By Mr. S. D. CAMPBELL, for Defendant: Defendant excepts to it and desires to state here, in addition to general exceptions, that this was withdrawn after Mr. L. L. Campbell had made his argument for the plaintiff, the opening argument, and S. D. Campbell had made his argument for the defendant.

By the COURT: Let the record show that attorney for the defendant was given permission to resume his argument, the argument upon this or any other phase of this case.

Thereafter, Mr. Gustave Jones, one of the attorneys for Plaintiff made the closing argument to the jury in this case in behalf of the plaintiff; and in the course of such argument said attorney made the following remarks and statements to the jury,
228 to-wit:

"The liability is fixed how? By the very occurrence itself,

in my judgment. It is conclusively established and uncontroverted that the running of a train——

At this juncture, the defendant duly objected, separately, to each of said statements of said attorney to the jury; and requested the court to instruct the jury that each of same was an improper statement to be made; and requested the court to reprimand counsel for making each of said statements.

By the COURT: The motion is overruled for the reason that the attorney says that the liability according to his own judgment is fixed. You (Jury) have got to arrive at your own conclusions.

And the Court overruled each of defendant's said objections, refused to instruct the jury that either of said statements was improper, and refused to reprimand plaintiff's said attorney for making either of said statements; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

And continuing his said argument to the jury, said attorney for the Plaintiff made to the jury each of the following remarks and statements, to-wit:

"Was the look-out kept? It not only was not kept; no dispute that it was not kept; but it is admitted; admitted boldly. Then when we prove that, Gentlemen of the Jury, in my humble
229 judgment we have established liability."

At this juncture, the defendant duly objected, separately, to each of said statements of said attorney to the jury; and requested the court to instruct the jury that each of same was an improper statement to be made; and requested the court to reprimand counsel for making each of said statements.

By the COURT: The objection is overruled for the same reason given in the other instance.

And the Court overruled each of defendant's said objections, refused to instruct the jury that any of said statements was improper, and refused to reprimand plaintiff's said attorney for making any of said statements; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

The foregoing instructions which are noted as having been given were all of the instructions given by the court to the jury in this case.

Thereupon, after hearing all the evidence, the instructions of the Court and argument of counsel; and after being out a while the jury returned into open court and announced their verdict as follows, to-wit:

230 *Verdict.*

"We, the jury, find for the plaintiff, as administrator, in the sum of $11,000.00 as damages for the pain and suffering of deceased; and $1,000.00 as damages for contributions to J. T. Craft, as father of the deceased.

L. B. HARRIS, *Foreman.*"

By the COURT: Any objections to the verdict? Do you object to the form of the verdict?

By Mr. CAMPBELL, for Defendant: The Defendant does.

By the COURT: What is the objection?

By Mr. CAMPBELL, for Defendant: That it doesn't conform to the instructions of the court and according to law.

The Court thereupon overruled each of defendant's said objections to said verdict, and ordered said verdict to be filed; whereupon the defendant at the time duly saved its exceptions thereto, separately and severally.

Thereafter, on Feb. 19, 1914, the defendant, by leave of the court, duly filed its motion for a new trial herein: which motion is in words and figures as follows, to-wit:

231 In the Jackson Circuit Court.

No. 2791.

J. T. CRAFT, Administrator of the Estate of Tom Craft, Deceased, Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Motion for New Trial.

Comes now the defendant and moves the court to set aside the verdict and judgment herein and to grant it a new trial of this cause, for the following reasons and upon the following grounds, to-wit:

1st. Because the Court erred in overruling defendant's demurrer to Paragraph I of plaintiff's amended complaint.

2d. Because the Court erred, separately and severally and in each separate instance, in overruling each of defendant's objections and permitting plaintiff's counsel to propound to plaintiff's witness *A. J. Spear* each of the following questions; and in permitting said witness to make each of the following answers thereto, to-wit:

Q. Did he (Tom Craft) report to your train?

A. Yes, sir.

Q. Did you give him any directions with reference to the train at the time he was there.

——, ——.

Q. Well, what was he doing? What was Tom Craft doing?

A. He was—I met him between track five and six just before we departed, just before time to depart.

232 Q. Well, did you give him any directions as to his work?

——, ——.

Q. Was he working under you, Mr. Spear?

A. Yes, sir, he would have been.

Q. Well, I will just ask the question if you know what was he doing somewhere about two o'clock on the morning of the 16th of February, 1913?

A. Me and him was walking between track five and six towards the engine.

Q. What was he doing, if anything, if you know, at that time? What was he doing?

A. He was going towards the engine; we was ready to leave town.

Q. Had he gone back in the direction of the caboose at any time?

A. Yes, sir.

Q. For what purpose, if you know?

A. I had asked him to go back to see if the caboose had been placed on the rear end of the train; and he had went back and saw that it was on there and I had met him some ten or twelve car lengths——

Q. You met him coming back?

A. Yes, sir.

Q. Was *the* one of his duties?

—. ——.

Q. Was he doing what you requested him to do?

A. Yes, sir, he had done as I told him and come back and told me the caboose was on the train; and I told him we was ready to leave town; and we walked between five and six towards the engine.

Q. What was the condition of the yard with reference to
233 light at that point?

—. ——.

Q. Well, was it light or dark?

A. It was night, two o'clock in the morning.

Q. How long after he had gotten into the office was it before the ambulance came.

A. I think the best I remember, the way we figured that night, it was about twenty-seven or thirty minutes from the time of the accident.

Q. Just as near as you can recollect, you say how long it was.

A. Not over thirty minutes.

Q. Do you know what ambulance it was that came?

A. No, sir, I don't remember whose ambulance.

Q. You don't know whether it was Reubel's or not?

A. No, sir, I do not.

Q. Do you know where the ambulance came from?

A. No, sir, I don't know; it came from over *in* Little Rock side, but I don't know what stable.

Q. To come from Little Rock, it would have to cross either the Iron Mountain Bridge or the Free Bridge, wouldn't it?

—. ——.

Q. Would it, or would it not? How would it have to come from Little Rock?

A. Why, have to cross the free bridge, I suppose.

Q. Do you know where Reubel's stable is from where the ambulance starts?

A. No, sir.

Q. Now the free bridge is at the foot of Main Street in Little Rock, isn't it?

A. Yes, sir.

234 Q. On what street, at the foot of what street is the free bridge you spoke about at Little Rock?

A. Foot of Main Street; Washington Avenue on the Argenta side.

Q. Now when it gets over to the Argenta side, how far is it there at the end of that bridge, the Argenta end of it, to the office where Tommy Craft was?

A. About eleven blocks, I guess, the way they would have to go.

Q. Now, right at that particular place where you and he were walking at the time you spoke of, you re-call, Mr. Speer? Or do you re-call? What do you re-call about it?

A. I don't remember whether it was all boxcars; might have been a low car in between.

Q. You made a statement with reference to this matter some time ago while the facts were somewhat fresh in your mind. You have made a statement with reference to your knowledge of the facts in this case? Did you?

A. I made a statement to the coroner's jury when I returned to Argenta.

Q. How long was that after the accident?

A. I expect it was two days.

Q. Wish you would read this, please, sir (handing witness paper). Now, Mr. Speer, since you have refreshed your recollection what can you tell the jury now as to what your recollection is as to the character of the cars in your train at that place?

A. Well, they would more than likely all be high cars at that point, near the engine.

Q. Do you remember where that pair of knuckles was, Mr. Speer?

235 A. It was between the tracks five and six.

Q. Mr. Speer, would you recognize, you think, the clothes that Tom Craft wore at that time?

A. Well, I couldn't say that I could. I don't know how the pants was——

Q. Mr. Speer, can you identify the clothing of the deceased?

—. ——.

Q. Mr. Speer, can you identify the clothing that has been shown to you in the absence of the jury as the clothing that the deceased had on at the time of the injury?

—. ——.

Q. I will say out of sight of the jury, when you examined them out of sight of the jury?

A. I wouldn't swear——

Q. Since the jury retired, have you examined the clothes that were exhibited to you?

A. I never touched the clothes.
Q. You looked at them?
A. I looked at the vest and pair of pants you held up.
Q. You can't identify them as the clothes that the deceased wore at the time?
A. No, I wouldn't swear to that.

And because the court erred, separately and severally and in each separate instance, in refusing to exclude from the jury each of the answers set forth in the foregoing paragraph- hereof.

3d. Because there was misconduct of plaintiff's counsel in interrogating plaintiff's witness A. J. Speer relative to the clothing
236 worn by deceased at the time of his injury, and in making a display of some clothing before the jury.

4th. Because the Court erred in refusing to instruct the jury that each of the questions propounded by plaintiff's counsel to plaintiff's witness A. J. Speer relative to the clothing worn by deceased at the time of his injury was improper, and that it was improper conduct for counsel to ask each of said questions; and erred in refusing to reprimand said counsel for such conduct.

5th. Because the court erred, separately and severally, in sustaining each of plaintiff's objections and refusing to permit defendant to interrogate plaintiff's witness N. B. Pyles, on cross examination relative to how long the work in the Argenta yards had been done in the manner it was done at time of injury; as to how long witness had been working in the Argenta yards; as to the railroad yards at Argenta being large and extensive; as to there being a great volume of business done at Argenta in the yards; and as to the greater part of the traffic of Little Rock and Argenta being done in the yards at Argenta.

And erred, in separate instance, in refusing to permit defendant to make proof of such propositions by said witness.

6th. Because the court erred, in each separate instance, in overruling each of defendant's objections and permitting plaintiff's counsel to propound to plaintiff's witness N. B. Pyles, on re-direct examination, each of the following questions; and in permitting said
237 witness to make each of the following answers, to-wit:

Q. Now, Mr. Pyles, the string of cars that you were switching, at least a part of them, were on the main —, were they?
—. ——.
Q. Well, where was the string of cars that you were making these cuts out of?
A. They were on the lead.
Q. They were on the lead?
A. Yes, sir.
Q. Now then, the switch, in order to get that car on Track Six, the switch would have to be turned there between the lead and the switch?
A. Yes, sir.
Q. How did you get the cars from the main line down to the switch?

A. Pull the cars up over the switch and throw this switch, line it up for No. 6; above the cars down there.

Q. And the distance the car would run after you had given it the kick until it stopped would be how far?

A. That would just depend on how the car would roll. That one went down—I suppose it would go three or four car lengths that night, from where everything stopped.

And also erred, in each separate instance, in refusing to exclude each of said answers from the jury.

7th. Because the Court erred, in each separate instance, in overruling each of defendant's separate objections and permitting plaintiff's counsel to propound to plaintiff's witness W. E. Hawkins each of the following questions; and in permitting said witness to
238 make each of the following replies thereto, to-wit:

Q. Just tell the jury how they——

A. Well, this pinch bar is a tool used for moving cars by hand; and they put this under the wheel, you know, push it a little at a time; had to move it about twelve inches, eight, ten or twelve inches, something like that, to release his clothes.

Q. Explain how that is used?

A. This bar slipped under the wheel, you know; push down on it; bear down on the bar, you know, that raises the wheel enough to move it.

Q. And by pushing down on the pinch bar, what effect does it produce on the wheel of the car, if any?

A. It causes the wheel to move.

Q. Did you notice how many times they had to use the pinch bar to get the wheel moved?

A. No, sir.

Q. What, if anything, did you have to do with getting him out from under the car?

A. I got hold of his feet, pushed his legs through from the outside, and there was a man underneath there to help pull him out.

Q. To refresh your recollection, I will ask you to note (handing witness paper) what manifestations, if any, did you hear him make?

A. Well, he would move his—try to move hisself; and I had ahold of his left arm and he tried to move his—seemed to move his body a little.

Q. What was the condition of his mouth with reference to
239 cinders, if any.

A. Well, his face was dirty.

Q. What was the expression on his face?

A. Well, I never paid particular attention to that.

Q. Now, did you go with him up to the office?

A. No, sir.

Q. What, if anything, in the place between tracks five and six did you observe?

A. I noticed some rubbish, some pins, and a knuckle or two, two or three knuckles in one pile there.

Because the court erred, in each separate instance in refusing to exclude each of said answers from the jury.

8th. Because the Court erred, in each separate instance, in overruling each of defendant's separate objections and permitting plaintiff's counsel to propound to plaintiff's witness L. H. Tanner each of the following questions; and in permitting said witness to make each of the following replies thereto; to-wit:

Q. Then you brought the pinch bar back?
A. Yes.
Q. Who brought the pinch bar back?
A. I did.
Q. What, if anything, then, did you do with the pinch bar?
A. I used it to release his body.
Q. Wish you would explain to the jury just how you did.
A. Well, I used the bar to pinch the car north about three inches, as one pair of wheels had had his body foul, which I could not couple into with an engine without running the car over him.

240 Q. And why did you move the car?
A. To release his body.
Q. To get him out of there?
A. Yes, sir, so we could get him out.
Q. Then what did you do?
A. What did I do?
Q. If anything, yes.
A. I left until he was taken out from under the car and placed on the cot.
Q. Then did you go with him to the office?
A. I helped to carry him to the office.
Q. How was he carried?
A. On a cot.
Q. What, if any, manifestations or signs of pain did you see that he gave?
A. Well, I heard him groan once or twice after I got to the car; and only thing I could see was—I say I heard him groan once or twice; and when he was taken out from under the car and put on a cot, I could see his muscles move; that is the only thing; I couldn't speak to him; I tried to speak to him.
Q. Did you see his face?
A. No, sir, I never looked at his face; I looked at his face once under the car, but I didn't look at it after he was on——
Q. How was the expression on it?
A. I couldn't say, you know, because it was dark and nothing but a lantern.
Q. Did you see the ambulance come?
A. I did.

241 Q. How long was it after you got him to the office?
A. I should judge about fifteen minutes.
Q. Well, how long was it from the time you went down there to help get him out until you got him to the office?
A. Why, I should judge about from between ten and fifteen minutes.

Q. Do you know whether anybody went in the ambulance with him or not?

A. No, sir, I don't.

Q. You say you saw his muscles jerking; tell the jury how they jerked.

A. Why, the only thing, seems like I could see him just kind o' jerk, you know; just like this (indicating).

Q. You made a statement in this case; to refresh your recollection, Mr. Tanner, I will show you (Hands witness paper). Now, tell the jury how his muscles jerked.

A. Why, how it was, of course, I don't know; I can't do it exactly; but though I could just see his muscles move, that was all, just quiver; his shoulder, possibly his shoulders and body, kind o' quiver; that was all; kind o' jerk.

Q. Well, did you ever see anybody that was in pain?

A. No, sir, not—of course, I have saw people in pain; I suppose was in pain; but I never witnessed nothing of that kind.

Q. Well, how about him?

A. Well, I couldn't say.

Q. Did you see a pile of knuckles and pins in the path
242 between track- five and six?

A. Why, they was some knuckles and three or four knuckle pins laying there between five and six.

Q. Did you observe along the rail anything?

A. No, sir.

Q. Now, you say you noticed blood north of where the car had stopped, did you.

A. Yes, sir.

Q. Did you observe any blood on the rails or track in the neighborhood of where Tom Craft lay?

A. Yes, sir.

Q. Did you observe how he was—what if any effect had been produced by the car, the wheel running over him? Whether his body had been injured in any way?

A. Yes, sir, I did.

Q. Was Tom Craft's body there (at coroner's inquest)?

A. I don't know, I didn't see it.

And because the court erred, in each separate instance, in refusing to exclude from the jury each of said answers.

9th. Because the Court erred in overruling defendant's objections and permitting plaintiff to introduce in evidence what purported to be letters of administration upon the estate of Tom Craft, deceased.

10th. Because the Court erred, in each separate instance, in overruling each of defendant's objections and permitting plaintiff's counsel to propound to plaintiff, while on the witness stand, each of the following questions; and in permitting said plaintiff
243 to make each of the following answers, to-wit:

Q. Where did you see his remains?

A. At Mr. Stanley's, J. R. Stanley's at Diaz.

Q. Did you notice any injuries on his body? You say you didn't?

A. He was in the coffin.

Q. Do you know what he was earning?

A. About what he was earning at the time he was killed.

Q. Yes?

A. About ninety, about ninety or ninety-five; sometimes a hundred and ten. Yes, sir, about that many dollars a month.

Q. What did he do with his earnings, if you know?

A. What he didn't use for himself, why he gave to me.

Q. Did he or did he not contribute anything to you out of his earnings?

A. Yes, sir.

Q. In what amount?

A. Well, at the time, about thirty-five, forty; at the time of his death thirty-five or forty dollars a month.

Q. What was your son's, what were his habits?

A. Good, sir.

Q. Well, as regards sobriety or industry or drunkenness or idleness?

A. No, sir. Perfectly. He was a model young man, sir.

Q. Was he idle and dissolute, or otherwise?

A. He was not.

Q. Well, what was his disposition, if you know it. State his character and disposition?

244 A. Good.

Q. What were those habits?

A. His habits; I say his habits were beyond reproach.

Q. Do you know, Mr. Craft, whether or not he used intoxicating liquors?

A. Why, not to excess; if he did it was very little, sir.

Q. Was he idle?

A. No, sir.

Q. Do you know what kind of a—what your son's habits were with reference to industry?

A. Why, he was industrious; always working; sober.

Q. Was he vigorous and able-bodied or otherwise?

A. Why, he wasn't a robust boy, but was healthy and had been since he had got to be, to manhood, or near it, and physically able to labor.

11th. Because the Court erred, in each separate instance, in overruling each of defendant's separate objections and permitting plaintiff's counsel to propound to the plaintiff's witness Cromwell West each of the following questions; and in permitting said witness to make each of the following answers, to-wit:

Q. Did you know his (deceased's) character and habits?

A. Yes, sir.

Q. You know what habits are?

A. Yes, sir.

Q. That is what a man does, ain't it?

A. Yes, sir.

245 Q. If you know those habits, what were they?

A. Why, he worked. And—I can tell it in my way; I don't know whether it is right or not. Why, he was a—he was one of the best boys in our neighborhood that I run with up there. He always stayed at home with his parents and worked and was obedient and went to church and took a great interest in Sunday School and things. He didn't go out and run around with the other boys and go to the river and things like that.

Q. Do you know whether or not he was a drinking man?

A. No, sir, he didn't drink; that is, to an excess. I never saw him drink any whiskey at all that I know of in my life. I saw him drink some beer, I believe.

12th. Because the court erred, in each separate instance, in overruling each of defendant's separate objections and permitting plaintiff's counsel to propound to plaintiff, while on the witness stand, each of the following questions; and in permitting said plaintiff to make each of the following answers, to-wit:

Q. Mr. Craft, had your son, the deceased, Tom Craft, contributed anything to you before his death?

A. Yes, sir.

Q. Do you recall when the last time was and what the amount of it was?

A. It was some time the latter part of December, 1912.

Q. How much was it?

A. A hundred and sixty-eight dollars, I believe; hundred and sixty or sixty-eight.

246 Q. Before that, next before that, if anything, what was the amount and when?

A. He gave me, I think the last time before that was in, I will say probably October, the same year; I think if my memory serves me right, sixty or sixty-three or sixty-four dollars.

Q. What, if any contributions did he make to you before his majority, before he became of age?

A. He had contributed to my support before and after he became twenty-one years old.

Q. What was his disposition, Mr. Craft, towards you?

A. Why, dutiful, kind, supporting.

Q. What were his habits?

A. Why, sober.

Q. How was his disposition with reference to labor?

A. Industrious, laboring and supporting me.

Q. Do you know what proportion of his time, during the time that he was old enough to work, or after his becoming of age, he put in at work?

A. Why, all of it.

Q. All of it?

A. Yes, sir.

Q. Well, you say "all"; all the time?

A. I don't think he was absent, as much as a week, to my certain knowledge, from the time he became twenty-one years old until his death.

Q. Do you know what is the next step, if there is any
247 other step, above brakeman? Line of promotion?

A. From braking to conductor.

Q. In promotion, a brakeman becomes a conductor in a certain length of time?

A. Yes, sir.

Q. Do you know, whether or not your son, Tom Craft, was in the line of promotion?

A. Yes, sir.

Q. You do know that?

A. I do know it.

13th. Because the court erred, in each separate instance, in overruling each of defendant's objections and permitting plaintiff's counsel to propound to the plaintiff's witness Cromwell West each of the following questions; and in permitting said witness to make each of the following answers, to-wit:

Q. Do you know, of your own personal knowledge, anything about Tom Craft, deceased contributed- to his father, J. T. Craft, any amount of money?

A. Yes, sir.

Q. Tell when it was and the circumstances of your knowing it?

A. Well, when they run the store up there at Diaz, I was working nights over there for Wilmans at the gin, was foreman over there, and Tom Craft run the baling box for me; and Saturday nights they would pay off over there, he would take his money over there and hand it over to his father.

Q. You have seen him do that?

A. Yes, sir.

248 Q. Was that after or before he was twenty-one years old?

A. Well, it was after he was twenty-one, for because he had been at work braking on the White River.

Q. Before that?

A. Before that. And he quit braking and come hom- on account of his father being sick, and took charge of the store there; and after his father got up able then to come back and sit around the store, sit around the store there, why Tom then went to work over there at nights at the gin, and would help out at the store there in the day time.

Q. And you saw him give money to his father while he was working there at the gin.

—. —.

Q. With reference to his working at the gin as you have just detailed, was it before——

A. Why, when he quit the railroad and come home there to the gin, why he got his check sent to him and I saw him endorse that and hand it to his father there in the store.

Q. Well, what other contributions, if any, did you see him make to his father?

A. Why, when he would give his father his wages that way, he would tell him "Now, if you——

14th. Because the court erred, in each separate instance, in overruling each of defendant's objections and permitting plaintiff's counsel to propound to plaintiff's witness L. H. Tanner each of the following questions; and in permitting said witness to make each of the following answers thereto, to-wit:

249 Q. Did you know, Mr. Tanner, about the manner of Tom Craft's work?

A. Well, yes——

Q. Did you know it?

A. I know in a way; I never knew of him laying off when he had a chance to work?

15th. Because the court erred, in each separate instance, in sustaining each of plaintiff's objections and refusing to permit the defendant to propound to plaintiff's witness L. H. Tanner, on cross examination, each of the following questions:

Q. When you saw Mr. Tom Craft injured, he was not conscious, was he?

A. Don't think he was conscious.

Q. And from your six months' acquaintance with him, rooming with him and observing him, and then seeing him right after the accident, what is your opinion as to his having, being conscious of pain and suffering?

And erred in each instance in refusing to permit defendant to make proof of such propositions.

16th. Because the court erred, in each separate instance, in overruling each of defendant's separate objections and permitting plaintiff's witness George M. Sink to testify that based on the American Table of Mortality the life expectancy of a man fifty-three years of age is eighteen and 79/100 years; and that the American Mortality table is recognized authority.

250 17th. Because the court erred in overruling defendant's objections and permitting plaintiff's counsel to interrogate defendant's witness H. Allen concerning what freight conductors on the Iron Mountain earn; and because the court erred during such examination in stating, in the presence of the jury, "That evidence was given by Mr. Craft, wasn't it?"; and because the court erred in permitting plaintiff's counsel to interrogate said witness relative to a comparison of the business of the railroad in the year 1912 and year 1913.

18th. Because the court erred, in each separate instance, in overruling each of defendant's objections and permitting plaintiff's witness A. J. Speer in rebuttal to testify that he was promoted from a brakeman; and that the average earnings of a freight brakeman will

probably average ninety dollars a month; and that conditions may vary as to the amount of time put in by an extra brakeman.

19th. Because the court erred, in each separate instance, in overruling each of defendant's separate objections and permitting witness H. E. Silcox, called by plaintiff in rebuttal, to testify that the width of the ordinary coal car is nine feet from out to out; that the side of a coal car would be about 2-2/10 feet beyond the rail.

20th. Because the court erred in refusing, at the close of the testimony, to instruct the jury to return a verdict for the defendant in this case.

251 21st. Because the court erred, in each separate instance, in overruling each of defendant's separate objections and in giving to the jury each of plaintiff's requested instructions which are numbered respectively as 1, 2, 3, 4, 5, 6, 9, and 10.

22nd. Because the court erred in each separate instance, in refusing to give to the jury each of defendant's requested instructions which are numbered respectively as 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18.

23rd. Because the court erred in modifying defendant's requested instruction No. 9 and in giving the same to the jury as modified.

24th. Because the court erred, in each separate instance, in overruling each of defendant's objections and permitting plaintiff's attorney, Mr. Gustave Jones, in making his argument to the jury in this case, to make each of the following remarks and statements, to-wit:

(*a*) He (defendant's counsel) says this car was not a train. I say under the laws of Arkansas a moving car is a train; just the same as a train; now that is the law; not my mere statement.

(*b*) Mr. Campbell goes outside of that in his argument and tells you that this moving car was not a train; now, I have got just as much right to give you my opinion as he has, and I tell you that it is a train.

(*c*) The liability is fixed how? By the very occurrence itself, in my judgment. It is conclusively established and uncontro-

252 verted that the running of a train——

(*d*) Was the look-out kept? It not only was not kept; no dispute that it was not kept; but it is admitted; admitted boldly. Then when we prove that, Gentlemen of the Jury, in my humble judgment we have established liability.

And because the court erred in refusing to instruct the jury that each of said remarks were improper and to reprimand counsel for making the same.

25th. Because that portion of the verdict of the jury herein which allows $11,000.00 as damages for the pain and suffering of deceased is (*a*) contrary to the law; (*b*) contrary to the evidence; (*c*) contrary to both the *land* and the evidence; (*d*) is without evidence to support it; and (*e*) is excessive.

26th. Because that portion of the verdict of the jury herein which allows $1,000.00 as damages for contributions to J. T. Craft as father of the deceased is (*a*) contrary to the law; (*b*) contrary to the evi-

dence; (c) contrary to both the law and the evidence; and (e) is without evidence to support it.

Wherefore, defendant prays as above.

S. D. CAMPBELL,
F. R. SUITS,
Attorneys for Defendant.

Filed Feb. 19, 1914. C. E. Smith, Clerk.

253 *Certificate of Judge to Bill of Exceptions.*

On March 7, 1914, a regular day of said term of court, said motion for new trial came on to be heard and was by the court overruled; to which action of the court in overruling said motion the defendant at the time duly saved its exceptions. And the defendant prayed and was granted one hundred twenty days' time from said date, March 7, 1914, to prepare and file its bill of exceptions herein; and was granted an appeal of this cause to the Supreme Court of Arkansas.

Wherefore, on this 25th day of May, 1914, the foregoing bill of exceptions is presented to the Honorable R. E. Jeffery, Regular Judge, presiding during all of said proceedings; is by him examined, found to be a correct reflection and record of said proceedings, is approved as such, and ordered to be filed as part of the record in this cause.

Witness my hand as such Regular Judge on this the 25th day of May, 1914.

R. E. JEFFERY,
Regular Judge of the Third Judicial Circuit of Arkansas.

The foregoing bill of exceptions examined and approved as correct.

JONES & CAMPBELL,
Attorneys for Plaintiff.
S. D. CAMPBELL AND
F. R. SUITS,
Attorneys for Defendant.

Filed May 25, 1914. C. E. Smith, Clerk.

254 *Fee Bill.*

C. E. Smith, Clerk	$15.00
C. E. Smith, Clerk, Transcript Supreme Court	52.25
J. F. McCuistion, Sheriff Jackson County	12.60
W. G. Hutton, Sheriff Pulaski County	4.35
Amos Jarman, Sheriff of Phillips County	.80
T. D. Bounds, Sheriff Monroe County	2.10
Jury Tax	3.00
Stenographer's Tax	3.00

Witness Fees.

Witnesses for Plaintiff.

W. E. Hawkins	3 days,	168 miles	21.30
N. B. Pyles	3 "	174 "	21.90
J. G. Armstrong	3 "		4.50
W. T. Moyer	3 "		4.50
B. Stanley	1 "		1.50
T. J. Hightower	3 "		4.50
Oscar Simmons	3 "		4.50
Cromwell West	4 "		6.00
J. S. Best	1 "		1.50
R. D. Wilmans	1 "		1.50
G. M. Sink	2 "		3.00
Ira Best	2 "		3.00
A. J. Speers	3 "	168 Miles	21.30
L. H. Tanner	3 "	168 "	21.30
W. E. Wallace	2 "	52 "	8.20
P. A. Lane	4 "	100 "	16.00
John Roberts	2 "	84 "	11.40
W. H. Maphet	2 "	84 "	11.40
255			
Dr. M. P. McNeill	1 day,	84 Miles	9.90

Witness for Defendant.

E. Honeycutt	3 days,	168 Miles	21.30
Total			$292.05

256 *Certificate of Clerk.*

STATE OF ARKANSAS,
County of Jackson, ss:

I, C. E. Smith, Clerk of the Circuit Court within and for the County and State aforesaid, as such Clerk do hereby certify that the above and foregoing and annexed — typewritten pages contain and are a full, true, perfect and complete copy and transcript of the papers filed, pleadings, records and proceedings in the case of J. T. Craft, Administrator of the Estate of Tom Craft, Deceased, Plaintiff, vs. St. Louis, Iron Mountain & Southern Railway Company, Defendant, together with the fee bill and Bill of Exceptions, and Exhibits thereto, as fully as the same now appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand as such Clerk, and affixed the seal of said Court, at my office in Newport, Arkansas, on this the 27th day of May, 1914.

[SEAL.] C. E. SMITH, Clerk.

257 [Endorsed:] No. 9239. St. Louis, Iron Mountain & Southern Railway Company, Appellant, vs. J. T. Craft, Administrator, Appellee. R. E. Jeffery, J. Jackson, Clerk. Transcript. Filed August 9, 1916. F. D. English, Clerk, By W. F. Sadler, D. C.

258 STATE OF ARKANSAS,
In the Supreme Court, ss:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of May, A. D. 1916, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 23rd day of November, 1916, a day of said term:

Record Entries.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Appellant,

vs.

J. T. CRAFT, as Administrator of the Estate of Tom Craft, Deceased, Appellee.

Appeal from Jackson Circuit Court.

Comes the attorney by its attorney and files a motion praying that this cause may be submitted at the same time with cause numbered 9240; and the court being fully advised, the said motion is suspended.

Comes also the appellant and files a motion to dismiss this cause; and the same being duly argued, is passed by the court for submission with the cause on its merits.

259 November Term, 1916.

(Caption Omitted.)

November 30, 1916.

This cause being regularly called, comes the parties hereto, by their attorneys, and said cause is submitted upon transcript of the record and the briefs filed and is by the court taken under advisement.

November Term, 1916.

(Caption Omitted.)

December 7, 1916.

This cause came on to be heard upon the transcript of the record of the circuit court of Jackson County, and was argued by counsel; on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause, except that the judgment for pain and suffering is ex-

cessive; but this error may be cured by reducing the amount of the judgment.

It is therefore considered by the court that the judgment of said circuit court in this cause rendered be for pain and suffering modified so as to reduce the same from the sum of Eleven Thousand Dollars to the sum of Five Thousand Dollars, and that said appellee recover of said appellant and W. M. Kavanaugh and Gordon N. Peay, sureties in the supersedeas bond filed in this cause, the said sum of Five Thousand Dollars, with interest thereon at six per cent from the 7th day of February, A. D. 1914, the date of said circuit court's judgment, and also all his costs in said circuit court in this cause expended, and have execution thereof.

260 It is further considered that said appellant recover of said appellee all its costs in this court in this cause expended and have execution thereof.

261 In the Supreme Court of Arkansas, Dec. 7, 1914.

No. 38.

ST. L., I. M. & S. RY. CO.
v.
CRAFT, Adm'r.

Opinion.

HART, *J.*:

J. T. Craft, as administrator of the estate of Tom Craft, deceased, sued the St. Louis, Iron Mountain & Southern Railway Company under the Federal Employers' Liability Act for damages for personal injuries sustained by the decedent which resulted in his death.

On the 16th day of February, 1913, plaintiff's decedent, while a brakeman in the employment of the defendant railway company — negligently run over in the night time by a coal car. He lived for something over thirty minutes and suffered great agony. At the time he was injured he was twenty-three years of age and made material contributions to the support of his father, J. T. Craft. The jury found for the plaintiff in the sum of $11,000.00 as damages for decedent's pain and suffering, and $1,000 as damages for contributions to his father. Judgment was entered upon the verdict and defendant has appealed from so much of the judgment of the circuit court as awarded to the plaintiff the sum of $11,000 for pain and suffering.

A motion has been made by counsel for plaintiff to dismiss the appeal because the defendant has failed to file an abstract in compliance with the rules of this Court. Counsel for the defendant concede defendant's negligence and for that reason state that they did not file an abstract on that point. They make no complaint

262 as to the verdict for contributions to the father of decedent and only ask that the judgment be reversed in so far as plaintiff recovered for decedent's pain and suffering. They have

abstracted the testimony on this point and the correctness of the verdict and judgment in this respect being the only issue raised by the appeal, we are of the opinion that plaintiff's motion to dismiss for non-compliance with rule nine of this court should be denied.

It is contended by counsel for the defendant that under the Federal Employer's Liability Act, as amended on April 5, 1910, the plaintiff is not permitted to recover both for pecuniary loss to the next of kin and for pain and suffering endured by the decedent. It may be said in the first place that we have decided adversely to defendant's contention in the case of St. Louis and San Francisco Railroad Company v. Conarty, 106 Ark. 421, and in the case of Kansas City Southern Railway Company v. Leslie, 167 S. W. 83. We adhere to the decisions there given for the reasons stated in those opinions and it would be useless to enter again into a discussion of the subject. Moreover, the defendant has only appealed from that part of the judgment which permitted a recovery for decedent's pain and suffering and is in no attitude to complain of an issue not raised by the appeal. No doubt any dissatisfaction that the defendant felt on account of the action in behalf of the next of kin was assuaged by the verdict of the jury and, not having taken an appeal from that part of the judgment it is now in no attitude to complain of it.

263 It is, however, earnestly insisted by counsel for the defendant that there is no evidence which would warrant a verdict against it for pain and suffering. We do not agree with them in that contention. The deceased was run over, in the night time, by a coal car of the defendant and was found lying face downward between the rails. The car at the time it struck decedent was only going at a moderate rate of speed and did not entirely pass over his body. Other employees of the defendant heard him hollow when the car struck him and immediately went to where he was. The car had pinned his body down between the rails and it was first necessary to raise it off his body. Decedent could not even then be removed from under the car until it had been pushed forward several feet. All this required about fifteen minutes' time and fifteen minutes more elapsed before the ambulance arrived and decedent was then sent to the hospital. At what time he died is not certain but it is certain that he was alive when they started to the hospital and that this was a period of thirty minutes after he had been struck by the car. His body was badly mangled and his intestines lacerated and very much swollen. All of the witnesses say that he was groaning during all the time they were trying to remove his body from under the car and until he was carried away in the ambulance. One of the witnesses stated that when he took hold of the decedent and tried to remove him from under the car the decedent would move his arms and also tried to move his body. His companions spoke to him but he did not answer them.

Under the circumstances we are of the opinion that the jury were

warranted in finding that the decedent suffered conscious
264 pain. It is true he never spoke to his companions but it must be remembered that while he was under the car and during the time they were trying to speak to him he was lying face downward, one wheel of the car resting on his body. One of his companions tried to raise him up and he moved his arm and tried to move his body. We think the jury were warranted in inferring from these facts that he was conscious and was doing all in his power to assist his companions in getting him out from under the car.

It is next contended by counsel for the defendant that a verdict for $11,000 was excessive and in this respect we think their contention is correct. In the case of Aluminum Company of North America v. Ramsey, 89 Ark. 522, we said: "It has been frequently said that it is difficult to find a measure of damages for pain, for the obvious reason that none would be an acceptable inducement to suffer it; but when it has occurred the compensation as such must be considered upon a reasonable basis of estimate. Under our system of jurisprudence, the amount of damages must be left largely to the reasonable discretion of the jury. Again, we may say, it has been repeatedly held that they may not give any amount they please." Though there should be some similarity in the award of damages for life injuries, still there is no exact rule for the measurement of damages and the facts of each case must be the basis on which the amount is predicated. If decedent suffered conscious pain (and we have already said that the jury were warranted in finding that he did) it is almost impossible to describe the terrible injuries which
he sustained and the untold agony and suffering which he
265 endured. We have never intended to fix by rule specific sums for different degrees and variations of anguish and suffering. Each case must be decided on its own merits with a due regard to the observance of reasonable uniformity, taking into consideration the peculiar facts in the case.

In the case before us after the decedent was struck by the car he was compelled to lie face downward for the space of fifteen minutes and for part of that time a wheel of the car rested upon his body. His suffering was doubtless greatly increased because he could not know how long it would be before he could be removed from under the car and how long it would be before surgical relief could be provided for him. Each additional minute of delay under the circumstances added to the horrors of his situation, and he must have suffered almost indescribable agony of mind and body. His body was mangled and his intestines were lacerated and swollen. It is evident that he suffered indescribable anguish and we are of the opinion that the jury were warranted in finding that he continued to suffer such anguish at least until he had been conveyed a part of the way to the hospital. Thus it will be seen that his suffering continued for more than thirty minutes and while we think that the sum of $11,000 was too large an amount to be awarded, we are of the opinion that plaintiff was entitled to recover the sum of $5,000 on that account.

Therefore the judgment will be reduced to $5,000 and for that amount will be affirmed.

266 *Authentication of Record.*

SUPREME COURT,
State of Arkansas, ss:

I, P. D. English, clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of St. Louis, Iron Mountain & Southern Railway Company, Appellant, vs. J. T. Craft, as Administrator of the Estate of Tom Craft, Deceased, Appellee, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this January 13th, 1915.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL, *D. C.*

267 In the Supreme Court of Arkansas.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Appellant,
vs.
J. T. CRAFT, as Administrator of the Estate of Tom Craft, Deceased,
Appellee.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above entitled cause, the appellant hereby prays a writ of error from the said decision and judgment to the United States Supreme Court and for an order fixing the amount of the supersedeas bond. And, the said St. Louis, Iron Mountain & Southern Railway Company assigns the following errors in the record and proceedings of the said case:

Assignment of Errors and Prayer for Reversal.

The Supreme Court of Arkansas erred in holding and deciding:

1. That under the Federal Employer's Liability Act of 1908, as amended on April 5, 1910, the plaintiff (Appellee) was permitted to recover both for pecuniary loss to the next of kin and for pain and suffering endured by the decedent.

2. In holding that there was sufficient evidence to warrant a verdict against appellant for decedent's pain and suffering.

3. In holding that a judgment for $5,000.00 for decedent's pain and suffering was not excessive.

Petition for Writ of Error and Allowance.

For which errors the appellant, St. Louis, Iron Mountain and Southern Railway Company, prays that the said judgment of the Supreme Court of the State of Arkansas, dated December 7, 1914, be reversed and a judgment rendered in favor of the appellant company and for costs.

E. B. KINSWORTHY,
Attorney for the St. Louis, Iron Mountain & Southern Railway Company.

268 STATE OF ARKANSAS,
Supreme Court, ss:

Let the writ or error issue upon the execution of a bond by the St. Louis, Iron Mountain and Southern Railway Company to James Thomas Craft, as Administrator of the Estate of Tom Craft, Deceased in the sum of Eight Thousand ($8,000.00) Dollars, such bond when approved to act as a supersedeas.

Dated December 29, 1914.

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Filed Dec. 29, 1914.
P. D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

269 ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellant,
vs.
J. T. CRAFT, Administrator of the Estate of Tom Craft, Deceased, Appellee.

Bond.

Know all men by these presents: That we, the St. Louis, Iron Mountain and Southern Railway Company, as principal, and the Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto J. T. Craft, Administrator of the Estate of Tom Craft, deceased, in the sum of Eight Thousand ($8,000.00) Dollars, to be paid to the said J. T. Craft, to which payment well and truly to be made we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 26th day of December, 1914.

Whereas, the above named appellant seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Arkansas.

Now, therefore, the condition of this obligation is such, that if the above named appellant shall prosecute its said writ of error to effect,

and answer all costs and damages that may be adjudged, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
By B. F. BUSH, *President.*
[Seal St. Louis, Iron Mountain and Southern Railway Co.]

Attest:
F. W. IRLAND,
Assistant Secretary.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
GEO. R. WENDLING, JR.,
Resident Vice-President.

[Seal Fidelity & Deposit Company of Maryland, Incorporated, 1890.]

Attest:
MARK CRAWLEY,
Resident Assistant Secretary.

Countersigned.
J. T. T——, [illegible].
Resident Agent Fidelity & Deposit Co.

[Endorsed:]

The within bond is approved this Dec. 29, 1914.
E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

Filed Dec. 29, 1914.
P. D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

270 (General.)

Power of Attorney.

Fidelity and Deposit Company of Maryland.

Home Office: Baltimore, Maryland.

Know All Men by These Presents:

That the Fidelity and Deposit Company of Maryland, by Fred S. Axtell, its Vice-President, and Wm. R. Bishop, its Assistant Secretary, in pursuance of authority granted by section 3, Article VI, of the By Laws of said Company, a copy of which section is hereto

attached, does hereby nominate, constitute and appoint John F. Lee, Robert L. McLaran, A. L. Shapleigh, Cecil D. Gregg and Geo. R. Wendling, Jr., Resident Vice-Presidents, and Mark Crawley and N. B. Many, Resident Assistant Secretaries, all of the City of St. Louis, State of Missouri, its true and lawful agents and attorneys-in-fact, to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed, any and all bonds and undertakings.

Such bonds and undertakings to be signed for the Company by either said John F. Lee, Robert L. McLaran, A. L. Shapleigh, Cecil D. Gregg or Geo. R. Wendling, Jr., and attested, and the seal of the Company affixed by either said Mark Crawley or N. B. Many.

It being understood that any bond executed under this power required in any state which has a resident agents law, shall be countersigned by a licensed agent of the Company, residing in the state where the bond is required.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons. This power of attorney revokes that of December 18th, 1913, in behalf of John F. Lee, et al.

In witness whereof, the said, Fred S. Axtell, Vice-President, and Wm. R. Bishop, Assistant Secretary, have hereunto subscribed their names and affixed the Corporate Seal of the said Fidelity and Deposit Company of Maryland, this 10th day of October, A. D. 1914.

FRED S. AXTELL,
Vice-President.

Attest:

[Seal Fidelity & Deposit Company of Maryland, Incorporated, 1890.]

W. R. BISHOP,
Assistant Secretary.

STATE OF MARYLAND,
City of Baltimore, ss:

On this 10th day of October, A. D. 1914 before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified came Fred S. Axtell, Vice-President, and Wm. R. Bishop, Assistant Secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in and who executed, the preceding instrument, and, they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signature as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Baltimore, the day and year first above written.

[Seal Wm. M. Reinhardt, Notary Public.]

WM. M. REINHARDT,
Notary Public.

Extract from By-Laws of the Fidelity and Deposit Company of Maryland, Adopted by the Stockholders of said Company on January 14, 1913.

"Article VI. Section 3.—The President, or any of the Vice-Presidents, elected by ballot from the members of the Board of Directors shall have power by and with the concurrence of the Secretary or any of the Assistant Secretaries, to appoint any attorney-in-fact or to authorize any person or persons to execute on behalf of the Company, any bonds, recognizances, stipulations, undertakings, deeds, releases of mortgages, contracts, and agreements and policies, and to affix the seal of the Company thereto."

I, Wm. R. Bishop, Assistant Secretary of the Fidelity and Deposit Company of Maryland, hereby certify that the aforegoing is a true copy of Section 3, Article VI, of the By-laws of said Company, and is still in force.

In testimony whereof, I have hereunto subscribed my name as Assistant Secretary, and affixed the Corporate Seal of the Fidelity and Deposit Company of Maryland, this 10th day of October, A. D. 1914.

[Seal Fidelity & Deposit Company of Maryland, Incorporated 1890.]

W. R. BISHOP,
Assistant Secretary.

Filed Dec. 29, 1914.
P. D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

271 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the St. Louis,

Iron Mountain & Southern Railway Company and J. T. Craft, Administrator of the Estate of Tom Craft, deceased, wherein was drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said St. Louis, Iron Mountain & Southern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to
272 the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 29th day of December, in the year of our Lord one thousand nine hundred and fourteen.

[SEAL.] SID B. REDDING,
Clerk of the District Court of the United States
for the Eastern District of Arkansas,
By W. P. FEILD, JR., *D. C.*

Allowed, Dec. 29, 1914.
E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Filed Dec. 29, 1914.
P. D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

273 *Certificate of Lodgment.*

SUPREME COURT OF ARKANSAS, *ss:*

I, P. D. English, Clerk of the said Court, do hereby certify that there was lodged with me as such clerk on 29 Dec., 1914, in the matter of St. Louis, Iron Mountain and Southern Railway Com-

pany, a corporation, v. J. T. Craft, as Administrator of the Estate of Tom Craft, deceased:

1. The original bond of which a copy is herein set forth,

2. Two copies of the writ of error, as herein set forth, one for the defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Little Rock, Arkansas, this December 29, 1914.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL, *D. C.*

274 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to James Thomas Craft, as Administrator of the Estate of Tom Craft, deceased, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Arkansas, wherein the St. Louis, Iron Mountain and Southern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and speedy justice should not be done the parties in that behalf.

Witness, The Chief Justice of the Supreme Court of the State of Arkansas, this 29 day of December, 1914.

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Attest:
P. D. ENGLISH,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL, *D. C.*

LITTLE ROCK, ARKANSAS,
W. D. Jackson.

I, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

W. D. JACKSON,
Attorney for James Thomas Craft, as Administrator of the Estate of Tom Craft, Deceased.

Filed Dec. 29, 1914.
P. D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

275 *Return to Writ of Error.*

UNITED STATES OF AMERICA,
Supreme Court of Arkansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this January 13th, 1915.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL, *D. C.*

Costs of Suit.

Circuit Court Costs	$240.25
Supreme Court Costs	78.75
Making Transcript, Pursuant to Writ of Error to Supreme Court of United States	80.00

Paid by Plaintiff in Error.

P. D. ENGLISH, *Clk,*
By J. H. CAMPBELL, *D. C.*

Endorsed on cover: File No. 24,520. Arkansas Supreme Court. Term No. 776. St. Louis, Iron Mountain & Southern Railway Company, plaintiff in error, vs. J. T. Craft, administrator of the estate of Tom Craft, deceased. Filed January 18th, 1915. File No. 24,520.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1916.

No. 778.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, *Plaintiff in Error*,

vs.

J. T. CRAFT, Administrator of the Estate of Tom Craft, Deceased, *Defendant in Error*.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM OR TRANSFER TO THE SUMMARY DOCKET.

Now comes the defendant in error, J. T. Craft, administrator of the estate of Tom Craft, deceased, by his attorneys of record herein, and moves this honorable court—

1. To dismiss the writ of error herein on the ground that this court should not entertain jurisdiction, the said writ of error being frivolous in its nature.

2. To affirm the judgment of the Supreme Court of the State of Arkansas, on the ground that it is manifest that the writ of error was taken for delay only, and that the questions upon which the decision in this case depend are so frivolous as to require little or no argument, being readily understood and decided upon a very brief statement.

3. To transfer this cause for hearing to the summary docket, if this court should refuse to dismiss or affirm, because the case is of such a character as not to justify extended argument.

JACKSON H. RALSTON,
WILLIAM E. RICHARDSON,
GUSTAVE JONES,
LON L. CAMPBELL,
Attorneys for Defendant in Error.

NOTICE OF MOTIONS.

The plaintiff in error is hereby notified that the defendant in error will, on the 12th day of April, 1915, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of this court the foregoing motions, and each of them, and the brief in support thereof hereto attached, including the opinion of the Supreme Court of the State of Arkansas and the assignments of error attached to the petition for writ of error, as contained in an appendix thereto, all of which is now served upon you herewith.

JACKSON H. RALSTON,
WILLIAM E. RICHARDSON,
GUSTAVE JONES,
LON L. CAMPBELL,
Attorneys for Defendant in Error.

Service of the foregoing notice, brief and appendix thereto attached acknowledged this
day of March, A. D. 1915.

Attorney for Plaintiff in Error.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiff below, J. T. Craft, administrator, alleged in his declaration that he was the administrator of the estate of Tom Craft, deceased, and that the deceased at the time of his injury complained of was engaged in interstate commerce carried on by defendant railway company. After describing the injury of deceased the complaint alleged:

> "That the said deceased was a young man of twenty-three years of age and unmarried, and left him surviving his father, J. T. Craft, who is fifty-three years of age, and who is dependent upon said deceased for support; that said deceased was of good habits, sober and industrious, and at the time of his death was earning on an average of one hundred dollars per month; that he was in line of promotion, and advancement, and would, had not death preceded, within a short time, have been advanced and promoted and his salary increased to two hundred dollars per month. That during the life of said deceased he contributed from one-half to two-thirds of his income to his father, and rendered many great and valuable services in that he nursed and cared for his father during his sickness, administered to his wants and looked after his care and comfort. That said father is in poor health and had said deceased lived, said father would have received during the remainder of his life, from one-half to two-thirds of the income of said deceased, as well as the benefits of personal services rendered by said deceased in nursing, caring for and looking after the comforts of the said father. Plaintiff says that by the injuries inflicted said deceased suffered great physical pain and mental anguish and the agonies of death for a period of over three hours, by reason of all of which plaintiff claims damages in the sum of $30,000."
>
> "Wherefore, premises considered, plaintiff prays judgment against said defendant company for the benefit of J. T. Craft, father of said deceased and the next of kin in the sum of $30,000 cost and all proper relief."

The jury returned a verdict in favor of the plaintiff in the sum of $1,000.00 for contributions and $11,000.00 for pain and suffering endured by the deceased. A judgment was thereupon entered in his favor of $12,000.00 in accordance with the verdict of the jury. An appeal was taken against so much of the verdict as related to a finding for pain and suffering, and in its assignments of error below, relief upon (1) lack of proof of conscious suffering, (2) excessiveness of verdict and (3) that the statute did not permit two recoveries.

The Supreme Court of Arkansas sustained the verdict in all of the respects assigned as error, but reduced the judgment to $5,000.00, and in this sum directed its affirmance. A writ of error was granted, the errors assigned being as follows:

1. That under the Federal Employers' Liability Act of 1908, as amended on April 5, 1910, the plaintiff (appellee) was permitted to recover both for pecuniary loss to the next of kin and for pain and suffering endured by the decedent.

2. In holding that there was sufficient evidence to warrant a verdict against appellant for decedent's pain and suffering.

3. In holding that a judgment for $5,000.00 for decedent's pain and suffering was not excessive.

We do not feel that we should spend any time in discussing the second and third points. The jury and the trial judge, and, in its turn, the Supreme Court of Arkansas, held that there was sufficient evidence to warrant a verdict for decedent's pain and suffering, and that $5,000.00 (according to the Supreme Court of Arkansas) was not an excessive amount to be allowed therefor. After such findings of fact by the courts below we respectfully submit that there will

be no disturbance of the judgment upon these points by this court.

As to the first objection we think it may be briefly disposed of. It is true that the Federal Employers' Liability Act of 1908 did not allow recovery for injuries and suffering during the lifetime of the decedent, but only for damages resulting from his death.

This situation was changed by the amendment of April 5, 1910, reading as follows:

> "SECTION 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representatives for the benefit of the surviving widow or husband or children of such employee, and if none, then of such employee's parents, and if none, then of the next of kin dependent upon such employee, but in such case there shall only be one recovery for the same injury."

It is apparent, therefore, that the recovery now sought to be set aside by the plaintiff in error was under this added section, but plaintiff in error is evidently confused by the last clause in the section, "but in such case there shall only be one recovery for the same injury," imagining that this means that if there was a recovery for the death as there was in this instance there could be no recovery for the injuries which finally resulted in the death, contending that granting a recovery for both constituted a double recovery for the same injury. We think the meaning of the statute is entirely obvious, and that the statute contemplates simply that no more than one suit can be brought for the injuries described in this act and not that there may not be joined a recovery for in the same action claims for death and for damages for personal suffering during lifetime.

The view that we take was that laid down by the Supreme Court of Arkansas, and is also followed by courts of the United States which have passed upon this question. We

quote from Northern Pacific Railway *vs.* Maerkl, 198 Fed., 1, as follows:

> "The act of April 10 (Sec. 9), provides that the right of action given by the act to a person suffering injury shall, in the event of his death, survive to the personal representative for the benefit of the persons named in the act, but only one recovery for the same injury. This amendment clearly contemplates that, while there is to be but one recovery for the same injury in cases resulting in the death of the person injured, that one recovery is to be had upon two independent and essentially different causes of action combined in the one, and that, in addition to the damages recoverable for the pecuniary loss or injury in the independent cause of action given by the act as it originally stood, the plaintiff is now entitled to recover a further sum upon the cause of action given to the person injured, and which now survives; so that recovery may now be had for the injury and suffering sustained by the deceased, as well as for the pecuniary loss or injury resulting to the beneficiaries from his death."

See also Cain *vs.* Southern Railway, 199 Fed., 211, and St. Louis, Iron Mountain Railway *vs.* Hesterly, 228 U. S., 702.

Respectfully submitted,

JACKSON H. RALSTON,
WILLIAM E. RICHARDSON,
GUSTAVE JONES,
LON L. CAMPBELL,
Attorneys for Defendant in Error.

IN THE SUPREME COURT OF ARKANSAS.

No. 38.

ST. L., I. M. & S. RY. CO.

vs.

CRAFT, Admr.

Opinion.

December 7, 1914.

HART, *J.*:

J. T. Craft, as administrator of the estate of Tom Craft, deceased, sued the St. Louis, Iron Mountain & Southern Railway Company under the Federal Employers' Liability Act for damages for personal injuries sustained by the decedent, which resulted in his death.

On the 16th day of February, 1913, plaintiff's decedent, while a brakeman in the employment of the defendant railway company, was negligently run over in the night time by a coal car. He lived for something over thirty minutes and suffered great agony. At the time he was injured he was twenty-three years of age and made material contributions to the support of his father, J. T. Craft. The jury found for the plaintiff in the sum of $11,000.00 as damages for decedent's pain and suffering, and $1,000.00 as damages for contributions to his father. Judgment was entered upon the verdict and defendant has appealed from so much of the judgment of the circuit court as awarded to the plaintiff the sum of $11,000.00 for pain and suffering.

A motion has been made by counsel for plaintiff to dismiss the appeal because the defendant has failed to file an abstract in compliance with the rules of this court. Counsel for the defendant concede defendant's neglect and for that

reason state that they would not file any abstract on that point. They make no complaint as to the verdict for contributions to the father of the decedent, and only ask that the judgment be reversed in so far as plaintiff recovered for decedent's pain and suffering. They have abstracted the testimony on this point and the correctness of the verdict and judgment in this respect being the only issue raised by the appeal, we are of the opinion that plaintiff's motion to dismiss for non-compliance with rule nine of this court should be denied.

It is contended by counsel for the defendant that under the Federal Employers' Liability Act as amended on April 5, 1910, the plaintiff is not permitted to recover both for pecuniary loss to the next of kin and his pain and suffering endured by the decedent. It may be said in the first place that we have decided adversely to defendant's contention in the case of St. Louis and San Francisco Railroad Company *vs.* Conarty, 106 Ark., 421, and in the case of Kansas City Southern Railway Company *vs.* Leslie, 167 S. W., 83.

We adhere to the decisions there given for the reasons stated in those opinions, and it would be useless to enter again into a discussion of the subject. Moreover, the defendant has only appealed from that part of the judgment which permitted a recovery for decedent's pain and suffering, and is in no attitude to complain of an issue not raised by the appeal. No doubt any dissatisfaction that the defendant felt on account of the action in behalf of the next of kin was assuaged by the verdict of the jury and not having taken an appeal from that part of the judgment, it is now in no attitude to complain of it.

It is, however, earnestly insisted by counsel for the defendant that there is no evidence which would warrant a verdict against it for pain and suffering. We do not agree with them in that contention. The deceased was run over in the night time by a coal car of the defendant, and was found lying face downward between the rails. The car at

the time it struck decedent was only going at a moderate rate of speed and did not entirely pass over his body. Other employees of the defendant heard him hollow when the car struck him and immediately went to where he was. The car had pinned his body down between the rails and it was first necessary to raise it off his body. Decedent could not even then be removed from under the car until it had been pushed forward several feet. All this required about fifteen minutes' time, and fifteen minutes more elapsed before the ambulance arrived and decedent was then sent to the hospital. At what time he died is not certain, but it is said that he was alive when they started to the hospital and that this was a period of thirty minutes after he had been struck by the car. His body was badly mangled and his intestines lacerated and very much swollen. All of the witnesses say that he was groaning during all the time they were trying to remove his body from under the car, and until he was carried away in the ambulance. One of the witnesses stated that when he took hold of the decedent and tried to remove him from the car, the decedent would move his arms and also tried to move his body. His companions spoke to him but he did not answer them.

Under the circumstances we are of the opinion that the jury were warranted in finding that the decedent suffered conscious pain. It is true he never spoke to his companion, but it must be remembered that while he was under the car, and during the time they were trying to speak to him, he was lying face downward, one wheel of the car resting on his body. One of his companions tried to raise him up and he moved his arms and tried to move his body. We think the jury were warranted in inferring from these facts that he was conscious and was doing all in his power to assist his companions in getting him out from under the car.

It is next contended by counsel for the defendant that a verdict for $11,000.00 was excessive and in this respect we think their contention is correct. In the case of Aluminum

Company of North America *vs.* Ramsey, 89 Ark., 522, we said: "It has been frequently said that it is difficult to find a measure of damages for pain for the obvious reason that none would be an acceptable inducement to suffer it; but when it has occurred, the compensation as such must be considered upon a reasonable basis of estimate. Under our system of jurisprudence, the amount of damages must be left largely to the reasonable discretion of the jury. Again we may say it has been repeatedly held that they may not give any amount they please." Though there should be some similarity in the award of damages for like injuries, still there is no exact rule for the measurement of damages, and the facts of each case must be the basis upon which the amount is predicated. If decedent suffered conscious pain (and we have already said that the jury were warranted in finding that he did) it is almost impossible to describe the terrible injury which he sustained and the untold agony and suffering which he endured. I have never intended to fix by rule specific sums for different degrees and variations of anguish and suffering. Every case must be decided on its own merits with a due regard to the observance of reasonable uniformity, taking into consideration the peculiar facts in the case.

In the case before us, after the decedent was struck by the car, he was compelled to lie face downward for the space of fifteen minutes and for part of that time a wheel of the car rested upon his body. His suffering was doubtless greatly increased because he could not know how long it would be before he could be removed from under the car and how long it would be before surgical relief could be provided for him. Each additional minute of delay under the circumstances added to the horrors of the situation, and he must have suffered almost indescribable agony of mind and body. His body was mangled and his intestines were lacerated and swollen. It is evident that he suffered indescribable anguish, and we are of the opinion that the jury were warranted in

finding that he continued to suffer such anguish at least until he had been conveyed a part of the way to the hospital. Thus it will be seen that his suffering continued for more than thirty minutes, and, while we think that the sum of $11,000.00 was too large an amount to be awarded, we are of the opinion that plaintiff was entitled to recover the sum of $5,000.00 on that account.

Therefore the judgment will be reduced to $5,000.00 and that amount will be affirmed.

IN THE SUPREME COURT OF ARKANSAS.

St. Louis, Iron Mountain and Southern Railway Company, *Appellant.*

vs.

J. T. Craft, *As Administrator of the Estate of Tom Craft, Deceased, Appellee.*

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above-entitled cause, the appellant hereby prays a writ of error from the said decision and judgment to the United States Supreme Court and for an order fixing the amount of the supersedeas bond. And the said St. Louis, Iron Mountain and Southern Railway Company assigns the following errors in the record and proceedings of the said case.

The Supreme Court of Arkansas erred in holding and deciding:

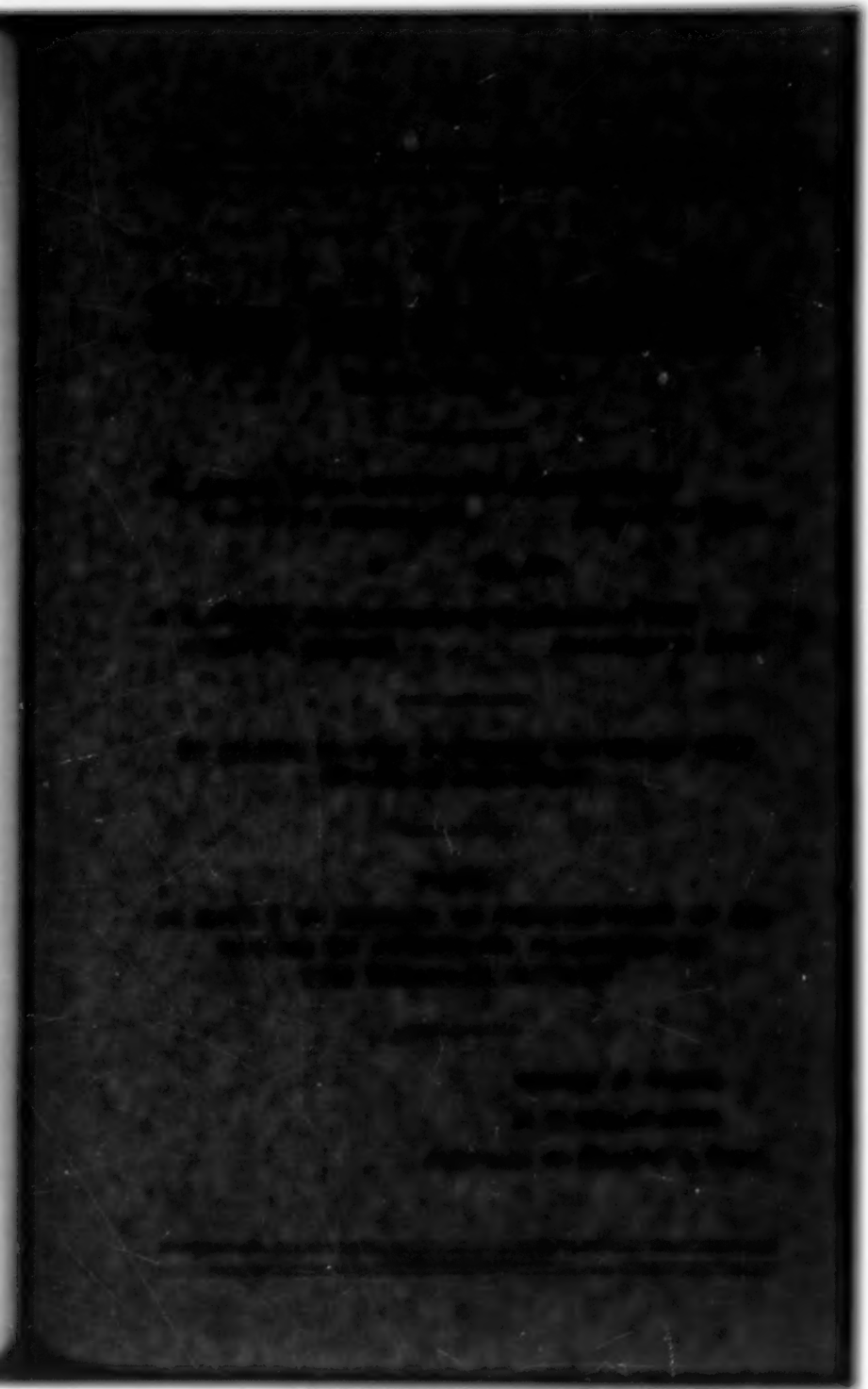
1. That under the Federal Employers' Liability Act of 1908 as amended on April 5, 1910, the plaintiff (appellee) was permitted to recover both for pecuniary loss to the next of kin and for pain and suffering endured by the decedent.

2. In holding that there was sufficient evidence to warrant a verdict against appellant for decedent's pain and suffering.

3. In holding that a judgment for $5,000.00 for decedent's pain and suffering was not excessive.

For which errors the appellant, St. Louis, Iron Mountain & Southern Railway Company, prays that the said judgment of the Supreme Court of the State of Arkansas, dated December 7, 1914, be reversed by a judgment rendered in favor of the appellant company and for costs.

E. B. KINSWORTHY,
Attorney for St. Louis, Iron Mountain & Southern Railway Co.



IN THE

Supreme Court of the United States

October Term, 1914.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.....*Plaintiff in Error,*

v. No. 776.

J. T. CRAFT, Administrator of the Estate of TOM CRAFT, deceased .....*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF.

IN REPLY TO MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM OR TRANSFER TO THE SUMMARY DOCKET.

This cause of action is based upon the Federal Employer's Liability Act. In the complaint the defendant in error sought to recover in one action upon two causes of action, towit:

1. For a pecuniary loss to the defendant in error by reason of the death of his son, Ton Craft, deceased.

2. For deceased's pain and suffering resulting in his death.

The jury returned a verdict for the defendant in error in the sum of one thousand dollars for pecuniary loss and eleven thousand dollars for the pain and suffering endured by the deceased. The judgment for $1,000 for pecuniary loss was paid by plaintiff in error. From the judgment for $11,000 for deceased's pain and suffering, an appeal was taken to the Supreme Court of Arkansas, which sustained the judgment of the trial court in all respects, except that the judgment for pain and suffering was reduced to $5,000. A writ of error to this court was applied for and granted by the Chief Justice of the Supreme Court of Arkansas.

In the petition for a writ of error plaintiff in error alleges that the Supreme Court of Arkansas erred in holding;

1. That, under the Federal Employer's Liability Act of 1908, as amended of April 5, 1910, the plaintiff was permitted to recover both for pecuniary loss to the next of kin and for pain and suffering endured by the decedent.

2. In holding that there was sufficient evidence to warrant a verdict against appellant for decedent's pain and suffering.

3. In holding that the judgment for $5,000 for decedent's pain and suffering was not excessive.

In his brief upon his motion herein defendant in error says:

"We do not feel that we should spend any time in discussing the second and third points. The jury and the trial judge, and in its turn the Supreme Court of Arkansas, hold that there was sufficient evidence to warrant a verdict for decedent's pain and suffering, and that $5,000 (according to the Supreme Court of Arkansas) was not an excessive amount to be allowed therefor. After such finding of fact by the court below, we respectfully submit there will be no disturbance of the judgment upon these points by this court."

It is embarrassing to the plaintiff in error to be called on to sustain the above assignments of error without the printed record in this case. Defendant in error has not waited until the record could be printed before filing his motion. It is therefore impossible for references to be made to the record which plaintiff in error thinks would justify the above assignments of error.

The contention of plaintiff in error is that there was no proof of conscious suffering on the part of the decedent, and that therefore there was no right to recover damages upon the cause of action for pain and suffering. The testimony established that a car wheel passed over the body of the decedent, crushing the lower part of his abdomen. Witnesses who reached him immediately testified that he was apparently unconscious; that while there were muscular movements, and they heard low

groans, no witness testified that decedent was conscious at any time after the war wheel passed over his body. It is the contention of plaintiff in error that the low groans heard and the muscular movements observed by the witnesses were mere incidents to the death, as held in *The Consair*, 145 U. S. 335. In that case, one of drowning, the court held that the fright of the decedent for a few minutes was too insubstantial a basis for estimation of damages.

If we are mistaken in contending that there was no right to recover damages for conscious pain and suffering, we feel confident that the court will find that an award of $5,000 for a moment's suffering is excessive.

In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McWhirter*, 229 U. S. 265, the court held that the contention in the State court in an action based solely upon a Federal statute that there was no evidence tending to show liability under that statute presents a Federal question, which, when denied, would support a writ of error from the Federal Supreme Court to the highest State court. Under this ruling, it would appear that plaintiff in error is entitled to have the question whether any liability was established for decedant's pain and suffering under the amendatory act of 1910.

In regard to the question whether the statute permits two recoveries in one action, defendant in error contends that the question has been determined adversely to the contention of plaintiff in error in *Northern Pacific Ry. Co.* v. *Markl*, 198 Fed. 1.

It is true that the circuit judge in the above case decided the question adversely to the contention of plaintiff in error. It does not appear that the question was fully argued or considered by the court. This question has been presented in the case of *St. Louis & San Francisco R. Co.*, plaintiff in error v. *Fannie M. Conarty, administratrix of the estate of W. F. Conarty*, deceased, defendant in error, No. 166, now pending in this honorable court. Until this question has been determined by the court of last resort, it will not, we presume, be deemed to be concluded by the decisions of other courts.

We respectfully submit that the defendant in error has shown no reason for advancing this case out of its turn, or for dismissing the writ of error or affirming the case.

Respectfully submitted,

EDWARD J. WHITE,

E. B. KINSWORTHY,

Attorneys for Plaintiff in Error.

INDEX

ABSTRACT OF RECORD.

Complaint 1

Answer 2

TESTIMONY.

A. J. Speer 2-5

N. B. Pyles 5, 6

W. E. Hawkins 7

L. H. Tanner 9, 10

Dr. M. P. McNeil 10

Instructions 12-13

Motion for New Trial 13

ASSIGNMENTS OF ERROR 14

INDEX

II.

SECOND ASSIGNMENT OF ERRORS.

Bunch v. St. Louis, I. M. & S. Ry. Co., 108 Ark. 396 36

Carolina, etc., Ry. Co. v. Shewalter, 161 S. W. 1136 31

Corsair, The, 145 U. S. 335 33

Karney v. Boston & W. B. Corp., 8 Cush, 108 ... 32

Kennedy v. Standard Sugar Refinery, 125 Mass. 90 32

Mulchahey v. Washburn Car Wheel Co., 145 Mass. 335 33

St. Louis, I. M. & S. Ry. Co. v. Dawson, 68 Ark. 1 ..... 33, 36

Sweetland v. Chi. & G. T. Ry. Co., 43 L. R. A. 568 31

Tully v. Fitchburg Rd., 134 Mass. 499 32

III.

THIRD ASSIGNMENT OF ERRORS 38

Chicago, R. I. & P. Ry. Co. v. White, 165 S. W. 627 40

Robert Graham Dun, The, 70 Fed. 270 40

St. Louis, I. M. & S. Ry. Co. v. Pate, 90 Ark. 136 39

St. Louis, I. M. & S. Ry. Co. v. Robertson, 103 Ark. 361 40

St. Louis, I. M. & S. Ry. Co. v. Scott, 103 Ark. 417 40

St. Louis, I. M. & S. Ry. Co. v. Stamps, 84 Ark. 241 39

IN THE

Supreme Court of the United States

October Term, 1914.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY .....*Plaintiff in Error,*

v. No. 776.

J. T. CRAFT, ADMINISTRATOR OF THE ESTATE OF TOM CRAFT, DECEASED, ...*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

ABSTRACT OF RECORD.

COMPLAINT.

J. T. Craft, as administrator of the estate of Tom Craft, deceased, sued the defendant, alleging a cause of action under the Federal Employer's Liability Act. The complaint contains three counts.

The first count alleged that plaintiff's decedent, a brakeman in the employ of the railway company, was negligently run over in the night time, on the 16th day of February, 1913, by a coal car, while he was engaged in interstate commerce. It alleged that he suffered great physical pain and mental anguish for a period of over three hours. Prayer for judgment in the sum of $30,000.

The second count alleged the same facts, and prayed judgment in the sum of $20,000 for pecuniary loss of the plaintiff as father of the deceased.

The third count prayed damages for pain and suffering in the sum of $10,000 for the benefit of the estate of deceased.

ANSWER.

The answer denied the negligence and the damages alleged.

TESTIMONY.

[As the question of negligence is not an issue upon this appeal, only so much of the evidence as relates to decedent's pain and suffering will be abstracted.]

A. J. SPEER testified: I am conductor for the defendant, and was in charge of train No. 66, which was moving from Argentia to St. Louis. Tom Croft was going to work as local brakeman that night. I was called for train No. 66 at 2 o'clock a. m. It was reported to me that Tom Croft was also called for that

[illegible]

him. I saw the switchman change No. 6 switch, just as he was run over, and I told him not to let any more cars in there. He changed it and did not let any more cars in. We got help around there as quick as we could, and run and got a pinch bar. If I remember right, it was Mr. Tanner that went after the pinch bar. He had to go to the tool house, fifty or seventy-five yards distant, and then come back. We placed the pinch bar under the wheel and moved the car back off of him, as easy as we could, and found his body. We found we couldn't get his body out between the arch bar and the rail. The arch bar was too low for his body to come through. His body was over inside the rails, and it would be impossible to pull him out over the rail, without the car was moved up, so we lifted the weight of the car off of his body, and brought him out right in here between 5 and 6, and placed him on a cot and carried him up to the yard office. When I got down there where he was lying with his body between the rails, I called to him several times, and he never answered. I heard him groan. He was alive. His pulse was beating. I think it was about fifteen minutes from the time I first heard him halloo until we got the upper wheel of the truck off of him, and got him out. There was seven or eight of us, and we worked and took him out as quick as we could. They put him on an ambulance, and that is the last I saw of him. It was thirty minutes from the time of the accident before the ambulance came. It came from over in Little Rock.

The ambulance would have to cross the free bridge, I suppose. It was eleven blocks from the end of the bridge to where Tommy Craft was. During the time I was taking him out from under the car, I heard him groan several times.

Q. What manifestations, if any, did he make?

A. He was unconscious.

Q. Well, you do not know that, do you? You are not a doctor?

A. Well, I know he couldn't speak.

Q. Did you hear him give any manifestations of pain or suffering?

A. I heard him give a low mournful groan a few times.

Q. Well, all you know is that he couldn't speak?

A. He never spoke to me, and I called to him several times. The wheel struck him about the hips.

N. B. PYLES testified: I am an engineer, and was handling the switch engine in Argenta yards February 16, 1913. I kicked that car in on track No. 6. I went down there to where he was. I suppose it is ten or twelve car-lengths from my engine. I found him under a coal car. There were several men there. They were trying to get him out from under the car. He was under the south end of the car, between the trucks, with

his feet on the outside of the rail and part of his body on the inside of the track. I could hear him groaning. I was there when they got him out. He was carried up to the yard office. I could hear him groaning every once in a while.

CROSS EXAMINATION.

I could not say how many times I heard him groan. I do not know when he died. It was probably five minutes after he was struck before I went down there. The last time I heard him groan was while they were taking him out from under the car. I suppose it was ten minutes, maybe. I think it was about ten minutes from the time he was struck until they got him out from under the car. I think he lived longer than that. He was still breathing when we carried him up to the yard office. That was, I suppose, about fifteen minutes after he was struck. He was alive at that time. I went back to my engine. I do not know how long he lived after he was struck.

RE-DIRECT EXAMINATION.

Q. Did you notice the position that Tommy Craft was in when you got down there?

A. His feet were on the outside of the rail and his body was between the rails. His face was on the inside of the track. I could not see whether he was lying face down or up.

W. E. HAWKINS testified: I am locomotive engineer for defendant. I was called to go north on the freight train at 2 a. m. My engine at that time was on track 5. I left my engine and went to the coal car where this boy was fastened. It was about two car-lengths from my engine. I found him lying on his face across the rail, with his feet on the outside of the rails and his body on the inside of the rails, on track 5. He was lying with his face down. His feet were between tracks 5 and 6, and his head and trunk were between the rails of track No. 6. One pair of wheels on the south trucks were standing on the boy's body. There was a connecting rod of the brake rigging across the back of his neck. I helped to take it off of him.

Q. What was Tom doing all of that time?

A. Why, he was not doing anything.

Q. What expressions was he making?

A. I couldn't tell that he was making any.

Q. Could you tell that he was making any sounds.

A. I could hear him breathing.

Q. Well, what movements did he make?

A. Well, when I took hold of him to pull him out from underneath there, he would raise his arm. I had hold of his left arm and he would pull his arm loose from me and try to pull himself.

Q. What, if anything, did you have to do with getting him out from under the car?

A. I got hold of his feet, and pushed his legs through from the outside, and there was a man underneath there to help pull him out.

When we got him out from under the car, we put him on a cot and some of the men took him to the yard office. I went back over to my engine.

Q. When you were trying to get him out from under the car did you notice any motions of his body?

A. No, sir; only the motion of his arm. You could take hold of his arm and he would try to move it.

Q. Did you observe anything about his shoulders?

A. Nothing particularly.

Q. Could you hear any noises from him?

A. I could hear him breathing, groaning like.

Q. Groaning?

A. Just a little; yes, sir.

I just heard him groan a little, and breathing, and that is all the sounds I heard him make. He was lying on his face, and he would pull his arm up this way when we would take hold of him. I saw his face when I took hold of him. His face was dirty. I never paid any particular attention to the expression on his face. I did not go with him to the office.

L. H. TANNER testified: I was engaged on the night of February 16, 1913, as engine foreman of what they call the "hole" engine. I kicked a coal car on track No. 6; I then kicked one on No. 8, and started to kick another on track No. 6, and Mr. Speer stopped me. After Mr. Speer stopped me, it was only a few seconds until I saw Mr. Craft, as quick as I could get down there. I had to go three car-lengths. When I saw him, he was lying on his face. I had to go about a block to get a pinch bar. I brought it back, and we used it to release his body. I helped carry him to the office. He was carried on a cot. I heard him groan once or twice after we got to the car. When he was taken out from under the car, I could see his muscles move. I tried to speak to him. I never looked at his face after he was out. I looked at his face once under the car. I couldn't say what was the expression on his face, because it was dark, and nothing but a lantern. I do not know whether he was still alive when we got to the office. I could tell he was still breathing. I went back to my work. It seems like I could see his muscles kind o' jerk. I did not observe any blood on his clothes. I noticed blood on the ground there. The biggest part of it was right near his body. A few feet north of it, I saw a little blood on the rail. The car wheel ran over his body. I don't know whether the wheel cut his body clear in two or not. I could tell it broke bones. His legs were limber. I never saw his flesh, only where it was cut through. I could see part of his flesh, but those bones

are bound to have been broken, that heavy car going over him. I had hold of his body once. I turned his face over and tried to speak to him. I was under the car. I never saw him after he left the office.

DR. M. P. McNEIL testified: I am a physician and coroner of Pulaski County. I saw the body of Tom Craft. He was run over by a coal car. It ran across the lower part of the abdomen, as well as I remember. There were two openings in the lower part of his abdomen here, as if some heavy pressure had borne on it, crushed; and, as well as I remember, one of his testicles was greatly swollen, enlarged like it was gouged out. I think there was something the matter with the left leg. From my examination, I would say that those injuries resulted in his death.

CROSS EXAMINATION.

Q. Those injuries were of such a nature as to cause immediate death?

A. Well, not in all cases. It may and it may not. I do not know when he died.

L. H. TANNER, recalled, testified:

Q. You testified yesterday in this case on behalf of the plaintiff, and was also recalled by the plaintiff today, and I asked you if, when you saw Mr. Tom Craft, in the injured condition, if he seemed to be conscious, suffering any conscious pain?

A. He did not seem to be conscious.

Q. Didn't seem to be conscious?

A. No, sir; that is, to my knowledge, what I would think, he wasn't.

Q. And, you testified that you had roomed with him for six months before this accident?

A. That I had roomed at the same place, not direct in the same room.

Q. Were you one of the first men to him after the accident occurred?

A. Yes, sir; I believe that I was; Mr. Speer and myself, I should think, was the first ones to him.

I helped to carry him to the office there in Argenta.

Q. Didn't seem to be conscious then, did he? Did he seem to be experiencing any conscious pain at that time?

A. Well, nothing only as I stated yesterday, his muscles, you could see his muscles move in his body.

RE-DIRECT EXAMINATION.

You could see his muscles jerk; his body quiver. He was breathing the last time I saw him. I heard him groan once or twice under the car. I did not see him lift his arm up. I did not see him try to lift his body off the ground.

I did not hear any groans as we were carrying him to the office.

The above was all the testimony upon the question of deceased's conscious pain and suffering.

INSTRUCTIONS.

The plaintiff in the trial asked and the court gave the following instruction numbered 9:

"9. If you find for the plaintiff, you will award such damages as may have been sustained by the deceased for the pain and suffering, if any, endured by him as a result of the injury, which amount is for the benefit of the estate of the deceased, to be recovered by the administrator; and you may also award such further sum as you may find from the evidence the deceased would have contributed to his father's support, if any, during his father's expectancy."

This instruction was objected to by defendant, and exception was duly saved to it.

The defendant requested the following instructions: 1, 2, 3 and 7, each of which was refused, over the objection of the defendant, and it separately saved its exceptions thereto:

"1. You are instructed to return a verdict for the defendant.

"2. Under the law governing this case, there can not be any recovery on account of pain or suffering endured by the deceased.

"3. There is no evidence to show that the deceased endured any conscious pain or suffering after the accident, and there can not be any recovery on account of pain or suffering.

"7. Any testimony that has been offered by the plaintiff as to pain and suffering upon the part of the deceased should be disregarded by you."

The jury found for the plaintiff in the sum of $11,000 as damages for deceased's pain and suffering, and $1,000 as damages for contributions to J. T. Craft as the father of deceased, and judgment was entered accordingly.

MOTION FOR NEW TRIAL.

A motion for new trial contained the following, among other grounds:

"21. Because the court erred in each separate instance in overruling each of defendant's separate objections, and in giving to the jury each of plaintiff's requested instructions which are numbered respectively as 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10.

"22. Because the court erred in each separate instance in refusing to give to the jury each of defendant's requested instructions which are numbered re-

spectively as 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18.

"25. Because that portion of the verdict of the jury herein which allows $11,000 as damages for the pain and suffering of deceased is (a) contrary to law; (b) contrary to the evidence; (c) contrary to both the law and the evidence; (d) is without evidence to support it; and (e) is excessive."

The motion for a new trial was overruled by the court, and defendant saved its exceptions thereto.

ASSIGNMENTS OF ERROR.

In the petition for a writ of error plaintiff in error alleges that the Supreme Court of Arkansas erred in holding:

1. That, under the Federal Employer's Liability Act of 1908, as amended April 5, 1910, the plaintiff was permitted to recover both for pecuniary loss to the next of kin and for pain and suffering endured by the decedent.

2. In holding that there was sufficient evidence to warrant a verdict against appellant for decedent's pain and suffering.

3. In holding that the judgment for $5,000 for decedent's pain and suffering was not excessive.

BRIEF.

1. UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT OF 1908, AS AMENDED APRIL 5, 1910, PLAINTIFF WAS NOT PERMITTED TO RECOVER BOTH FOR PECUNIARY LOSS TO NEXT OF KIN AND FOR DECEDENT'S PAIN AND SUFFERING.

The cause of action in the above case arose under the Federal Employer's Liability Act of 1908, as amended in 1910.

The act of April 22, 1908, section 1, is as follows:

"Every common carrier by railroad, while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States and Territories or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, *or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents, and, if none, then to the next of kin dependent upon such employee for such injury or death* resulting in whole or in part from the negligence of any of the officers, agents or employees of such car-

rier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

On April 5, 1910, Congress amended the act by adding:

"Section 9. That any right of action given by the act to a person suffering injury shall survive *to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.*"

In construing section 1, *supra,* in *Michigan Central R. Co.* v. *Vreeland,* 227 U. S. 68, the court said:

"The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured for the loss and damage resulting to them financially by reason of the wrongful death. Thus, after declaring the liability of the employer to the injured servant, it adds: 'Or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death,' etc. There is no express

or implied limitation of the liability to cases in which the death was instantaneous.

"This cause is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had, one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only.

"The statute, in giving an action for the benefit of certain members of the family of the decedent, is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being—that of 9 and 10 Vict., chap. 93, known as Lord Campbell's Act. This act has been, in its distinguishing features, re-enacted in many of the States, and both in the courts of the States and of England has been construed not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the deprivation, pecuniarily, resulting to them from his wrongful death. * * *

"The distinguishing features of that act (Lord Campbell's) are identical with the act of Congress of

1908 before its amendment. First, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries."

In adopting the amendment of 1910 Congress intended to provide for survival of the employee's right of action, which is a different liability from that imposed by the death act above discussed. In providing that "there shall be only one recovery for the same injury," Congress recognized that otherwise two separate actions might be brought, in case of the wrongful death of an employee, viz., one under the death act, and one under the survival act. An action by the injured party might be pending at the time of his death, caused by the injury. This action would survive. Another action might be subsequently brought for the pecuniary loss to the next of kin.

Similar provisions are found in the statutes of most of the States. In some of them, where there is a survival act as well as a death act, the latter is held to be limited to cases of instantaneous or immediate death, and cases where the death was not instantaneous or immediate are held to fall under the survival statute. This is the construction adopted in Maine and Michigan. *Sawyer* v. *Perry*, 88 Me. 42; *Anderson* v.

Wetter (Me.), 15 L. R. A. (N. S.) 1003; *Dolson* v. *Lake Shore & M. S. Ry. Co.*, 128 Mich. 444; *Belding* v. *Black Hills & Ft. P. R. Co.*, 3 S. Dak. 369. In an earlier Michigan case, however, it was said, *obiter*, that the only logical construction is that given by most of the cases; that is, that the survival act applies to cases of negligent injuries to the person that are not fatal, and that Lord Campbell's Act applies to fatal cases." *Sweetland* v. *Chi. & G. T. R. Co.*, 117 Mich. 329, 43 L. R. A. 574.

We infer from the *Vreeland* case, quoted *supra*, that the Supreme Court of the United States will not follow the above cases in so far as they hold that the death act applies only to cases of instantaneous death.

In a number of States it is held that the death acts provide a complete remedy, whether the death is instantaneous or not, if the death results from the injury; but if it results from some other cause, the survival act provides the only remedy. *Holton* v. *Daly*, 106 Ill. 131; *Chicago & E. I. R. Co.* v. *O'Connor*, 119 Ill. 586; *Lubrano* v. *Atlantic Mills*, 19 R. I. .., 34 L. R. A. 797; *McCarthy Case*, 18 Kan. 46; *Martin* v. *Missouri-Pac. Ry. Co.*, 58 Kan. 475; *Hulbert* v. *Topeka*, 34 Fed. 510.

In Kentucky it is held that an administrator, having a right to sue for a decedent's pain and suffering or to sue under the statute for his death, must elect which he will do, and can not do both. *Conner* v. *Paul*,

12 Bush 144; *Louisville & N. R. Co.* v. *McElwain*, 98 Ky. 700, 56 Am. St. 385, 34 L. R. A. 788; *Hendricks* v. *American Exp. Co.*, 138 Ky. 704. So, where two actions were begun, the administrator was held to be entitled to elect which he would defend, and plead its pendency in bar of the other. *Henderson* v. *Ky. Cent. R. Co.*, 86 Ky. 389.

Notwithstanding the divergent views of the courts upon the meaning and effect of the death and survival acts, as we have shown above, *all of the above cases agree in holding that there can only be one action for damages caused by the wrongful act of another.* It matters not which view of this statute is taken, if the court adopts either of the above views, it would follow that the two causes of action can not be combined in this suit.

That the two actions can not be sustained for the same injury, see, further, *McCafferty* v. *Pa. Rd. Co.*, 193 Pa. St. 339, 74 Am. St. 690; *Edwards* v. *Gimbel*, 202 Pa. St. 30; *Fritz* v. *W. U. Tel. Co.*, 25 Utah, 263; *Consolidated Coal Co.* v. *Dombriski*, 106 Ill. App. 641; *Hartigan* v. *Southern Pac. Co.*, 86 Cal. 142; *Munro* v. *Dredging, etc., Co.*, 84 Cal. 515; *Andrews* v. *Hartford, etc., Rd. Co.*, 34 Conn. 57; *Putnam* v. *Southern Pac. Co.*, 21 Ore. 233; *Legg* v. *Britton*, 64 Vt. 652; *Littlewood* v. *New York*, 89 N. Y. 24.

It is held in California that there can be but one action and one recovery of damages for the death of

a person. If the action is maintained and a judgment recovered by his widow, his posthumous child, born after such recovery, and whose existence was unknown to the defendant in the action, can not maintain a further action on the ground that he was conceived before such former action was commenced, though the statute of the State declares that a child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent death. *Daubert* v. *Western Meat Co.*, 96 Am. St. 154, 139 Cal. 480.

"Where the plaintiff, in an action for personal injuries, dies from such injuries pending the action, and his administrator recovers judgment therein, such judgment is a bar to an action by the administrator or the beneficiaries for the death by wrongful act." 13 Cyc. 327.

There are cases which hold that, in case of a wrongful death, two separate actions might be brought by the administrator, one for the benefit of the estate and the other for the benefit of the widow and next of kin. *Bowes* v. *Boston*, 155 Mass. 344; *Davis* v. *Railway*, 53 Ark. 117; *Mahoning Valley R. Co.* v. *Van Alstine* (Ohio), 14 L. R. A. (N. S.) 893; *Stewart* v. *United Electric Light & Power Company* (Md.), 8 L. R. A. (N. S.) 384.

With reference to the above four cases, the Massachusetts case cites no authority. The Arkansas case

quotes extensively from *Needham* v. *Railway*, 38 Vt. 294. In fact, much of the phraseology and reasoning of the opinion in the Davis case is taken from the Vermont case. Subsequently, the Vermont court decided that the Needham case, so far as this point is concerned, was *obiter dictum*, and erroneous.

Where the injured person began a suit in his lifetime, which his administrator prosecuted to judgment after his death, the Vermont court held that the judgment barred a second suit for the benefit of the widow, although the damages awarded in the first suit were solely for the injuries to the deceased in his lifetime. *Legg* v. *Britton*, 64 Vt. 652.

In that case the intestate was injured by the unlawful act or neglect of the defendant. He brought suit to recover therefor, and died, pending the suit, from the injury so received. The administrator prosecuted the suit to final judgment, which was satisfied, and subsequently brought a second suit to recover for the widow and next of kin the pecuniary injury resulting to them from the death of the intestate. Defendant pleaded the former judgment in bar. In reaching the conclusion that the second suit was barred, the court held that the statute providing for the recovery of damages for benefit of the widow and next of kin, where death results from the neglect or default of a person, does not create a new and additional cause of action in favor of such beneficiaries, but provides a

new class of damages in case a right of action would have existed in the deceased person if living, and hence that, if this right of action were extinguished in intestate's lifetime, no further recovery could be had after his death.

The Ohio case cites *Davis* v. *Railway, supra,* and *Brown* v. *Chicago & N. W. Rd. Co.* (Wis.), 44 L. R. A. 579, and relies principally upon the argument that the two causes of action are distinct and in separate rights. The Brown case merely decides that the two causes of action are separate and distinct. On page 584, the Wisconsin court said: "Of course, there can be no question as to whether a recovery on one claim will bar an action for the other; therefore, what is said should not be taken as deciding that question."

The Maryland court cites authorities, English and American, to the effect that the death and survival actions are separate and distinct. Nearly all of the authorities, English and American, are to that effect.

The question is whether the Legislature intended that two actions should be prosecuted for the same injury. The highest court of England applied the maxim, *"Nemo debet bis vexari pro una et eadem causa,"* in a recent case. *Wood* v. *Gray,* 1892, A. C. 576. See concurring opinion of Field, J. This is the principle which controls the courts, which hold that only one action can be brought for an injury resulting in death. None of the cases above cited, which hold

that two actions may be prosecuted concurrently, meet this argument.

Before the case of *Davis* v. *Railway*, 53 Ark. 117, was decided, the question whether two actions would lie in this State for an injury which caused death came before the Federal circuit judges.

In construing the Arkansas statute, Sanborn, J., in *St. Louis, etc., Ry. Co.* v. *Needham*, 10 U. S. App. 339, 52 Fed. Rep. 371, said: "It gives 'an action' a single action, not several actions, for the wrongful killing. It provides that every such action must be brought in the name of the personal representatives, if there are such; otherwise, by the heirs-at-law. It will not be gravely insisted that the personal representatives could maintain more than a single action, or that, where there are several administrators, one of them could maintain the action without joining all; and it is equally clear that when the action is brought by the heirs there must be but a single action, and all the heirs must be made parties to it, so that the entire controversy may be determined and the entire amount recovered and distributed in the single action given by the statute. The simplicity and effectiveness of such an action, the inconvenience and injustice to the plaintiffs and defendants alike resulting from any other practice; the rule of distribution of the amount recovered, based not upon the injury to each person entitled to receive a share, but upon the statute of descents;

the settled rule of law as to parties jointly interested in a case of action, and the plain reading of the statute, compel the conclusion that such was the intention of the Legislature."

In *Louisville & N. R. Co.* v. *McElwain*, 98 Ky. 385, it was held that where a wife was killed by the negligence of a railroad company, a recovery by the husband, as personal representative, of damages, under a statute allowing a right of action for a personal injury to survive to the personal representative, is a bar to his common-law right of action, as a husband, to recover damages for the loss of his wife's society from the time of the injury until her death. The court said: "We can not believe that the General Assembly intended that the personal representative should maintain an action for the death of the wife, practically for the husband's benefit, and allow at the same time the husband to maintain one on his own account, for the same acts or negligence. * * * It was not the intention of the Legislature to multiply actions. The husband must accept the benefit which the statute secures him in lieu of those he possessed at common law." Compare the somewhat similar case of *McGovern* v. *N. Y. C., etc., R. Co.*, 67 N. Y. 417.

In Pennsylvania the two statutes—the survival act and the death act—are found. The court said: "Under these acts two actions can not be sustained for the

same injury." *McCafferty* v. *Pa. Rd. Co.*, 193 Pa. St. 339, 74 Am. St. 690.

In *Sawyer* v. *Perry*, 88 Me. 42, in construing the act of 1891, c. 124, similar to Lord Campbell's Act, to give a remedy where an injured person dies immediately, a case not covered by the survival statute, the court said: "The court could not believe that the Legislature intended to give two remedies for a single remedy. It had become settled law in this State that if a person was injured through the negligence of another person, or a corporation, and afterward died of his injuries, redress could be obtained by his personal representative. But it has been held in Massachusetts (and the law was assumed to be the same in this State), that, if the person injured died immediately, no redress could be had. And it was believed that it was the intention of the Legislature to remedy this defect—not to give a new right of action where ample means of redress already existed, but to supplement the existing law, and give a new right of action in a class of cases where no means of redress already existed. And it was believed that full effect would be given to the legislative intention by limiting the new right of action to cases where the persons injured died immediately."

All of the cases which hold that there can be only one action for damages caused by the wrongful act of another, whether they hold that the survival statutes applies in every case where death is not instantaneous,

or that the death act provides the only remedy save where death results from some cause other than the injury, or that the administrator must elect which suit he will bring, are based upon the idea that it was not the legislative intent that the defendant should be harassed with two actions growing out of the same injury.

It was expressly so provided by Lord Campbell's Act, section 3 of which is as follows:

"Sec. 3. Provided, always, and be it enacted, that not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person."

In *Wood* v. *Gray*, 1892, A. C. 576, a workman, having been injured through fault of his employers, brought an action against them for damages. While the action was pending, he died, intestate and unmarried. His mother was appointed his executrix, and she raised a second and concurrent action for *solatium* for her son's death, and asked that the second action should be remitted to the same jury who were to try the first action. *Held*, that the second action was incompetent.

After holding that, under the Scottish law, the first action survived, Lord Watson said:

"To my mind, the only relevant question in the present case is, has the rule ever been carried so far as to recognize the competency of an action at the instance

of relatives, where an action, in respect to the same injuries, has been raised by the deceased during his lifetime, and is still a depending litigation? Unless that question can be answered in the affirmative, the appellant's action is, in my opinion, incompetent.

"There is no case to be found in the reported decisions of the Court of Sessions in which an action by relatives was sustained after the deceased's claim had been settled or extinguished by an adverse judgment, or where he had raised an action which passed to or might be insisted in by his executor; and the existence of such a right of action has not been affirmed, or even suggested, by any text writer. There is not a single instance in which the court has allowed two actions to be brought in respect of the same negligent act, leading to the injury and death of one person. Even in cases where the right of relatives to sue has been recognized, they must bring one suit, and one only, in which the damages due to them respectively may be assessed."

It would seem that the amendatory section 9, adopted by Congress in 1910, should be construed in view of section 3 of Lord Campbell's Act as construed by the House of Lords in *Wood* v. *Gray*, *supra*, and of the holding of the highest courts of a large majority of the States. In providing that "there shall be only one recovery for the same injury," Congress did not contemplate that the two causes of action should be combined in one suit, as is the approved practice in Ark-

ansas and a few other States, but that only one cause of action should lie for an injury resulting in death.

An additional reason for the construction for which we contend appears from consideration of the language of the original statute and the amendatory statute with reference to the beneficiaries of the action.

In *Gulf, etc., R. Co.* v. *McGinnis,* 228 U. S. 173, in construing the Employers' Liability Act of April 22, 1908, the court used the following language, viz:

"The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. *That apportionment is for the jury to return.* This will, of course, exclude any recovery in behalf of such as show no pecuniary loss." See also *Louisville & N. R. Co.* v. *Stewart's Adm'r,* 156 Ky. 550.

The original act of April 22, 1908, provides that in case of the death of an employee the carrier shall be liable "to his or her personal representative *for the benefit of the surviving widow or husband or children of such employee; and, if none, then to such employee's parents; and, if none, then of the next of kin dependent upon such employee,* for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, etc." The

amendatory act of April 5, 1910, providing for a survival of the cause of action for personal injuries, provides that this right of action shall survive *"for the benefit of the surviving widow or husband and children of the employee; and, if none, to the next of kin dependent upon such employee,* but in such cases there should be only one recovery for the same injury." In the McGinnis case the quotation which we have given shows that the recovery for each beneficiary under the original act is measured by his or her individual pecuniary loss. The very same language is found in the amendatory act. There is nothing whatever in the amendatory act which indicates that the provision for the recovery of the individual peceuniary loss shall be cumulative to the recovery for the same loss under the original act. If, by the veredict of a jury, a dependent beneficiary received the amount of his individual pecuniary loss, under the act of 1908, why should he be permitted to recover for the same pecuniary loss under act of 1910? Manifestly, the jury should not be permitted to make a double allowance in two separate causes of action for the same pecuniary loss.

In this case the record shows that plaintiff recovered two judgments, for $11,000 for pain and suffering and $1,000 for loss of pecuniary profits. The judgment for $1,000 was paid in full, and an appeal was taken from the judgment for $11,000. If plaintiff had a right of election between the two causes, he has failed

to make same. In default upon his part in making such election, defendant would be entitled to make the election. When it did so and tendered the $1,000 in satisfaction of the judgment for pain and suffering, plaintiff should thereafter be held to have made his election.

2. THERE WAS NOT SUFFICIENT PROOF OF CONSCIOUS SUFFERING.

Section 9 of the act of Congress of 1910, providing that any right of action given by the act to a "person suffering injury" shall survive to his personal representative, creates no new cause of action, and has no application where there is an instantaneous killing. *Carolina, etc., R. Co.* v. *Shewalter,* 161 S. W. 1136.

In *Sweetland* v. *Chi. & G. T. Ry. Co.,* 43 L. R. A. 568, it was held that there could be no recovery of damages for pain and suffering in the killing of a passenger where it was purely conjectural whether the death was instantaneous or not. The court said: "The rule deducible from the above authorities, and we think also from sound reason, is that plaintiff must show that there was conscious suffering in order to sustain his suit for damages. It is not sufficient to show that the deceased might have lived a few moments after the accident."

The mere fact that there was evidence of some slight spasmodic action on the part of the deceased,

where the other evidence tended to show that death was immediate, has been held not sufficient to prevent the court from directing a verdict for the plaintiff on the ground that the death was instantaneous. Tiffany, Death by Wrongful Act, § 74.

In *Kearney* v. *Boston & W. B. Corp.*, 8 Cush. 108, a female named Ann Kearney was run over by a train, A girl who was standing about two rods away saw her run over, and immediately ran to her. She saw her move her hands and feet slightly; but the deceased breathed only once after the arrival of the witness and gave no sign of consciousness. This witness then ran back toward the house, and, on her way, met another witness, who went with her to the fatal spot. The latter testified that the deceased might have stirred a little bit after she arrived, but she showed no other sign of life, and appeared to be dead. The court directed a verdict for defendant. *Held*, no error.

In *Kennedy* v. *Standard Sugar Refinery*, 125 Mass. 90, 28 Am. Rep. 214, plaintiff's intestate fell from a platform twenty feet to the ground, became instantly unconscious, and died thirty-six hours later. *Held*, no damages are recoverable for his mental suffering.

Where a person struck by a locomotive engine remained in a perfectly unconscious condition until his death, there could be no recovery for mental or physical suffering. *Tully* v. *Fitchburg Rd.*, 134 Mass. 499.

See also *St. Louis, I. M. & S. Ry. Co.* v. *Dawson,* 68 Ark. 1.

Where the body of deceased was not found until some minutes after the accident which caused his death, at which time he was alive but unconscious, held that, as there was no direct evidence of conscious suffering on the part of the deceased, a ruling that his administratrix was entitled to recover only nominal damages was correct. *Mulchahey* v. *Washburn Car Wheel Co.,* 145 Mass. 335, 1 Am. St. 458.

In that case the deceased was found five or ten minutes after the accident, with his body crushed and his bowels disrupted, and, although breathing, he was unconscious, and died in a few minutes afterward, without recovering consciousness. The trial court held that there was no evidence to warrant the jury in finding that intestate endured conscious pain or suffering, and that plaintiff was only entitled to recover nominal damages, if any." The Supreme Court of Massachusetts said: "Instantaneous death and absence of conscious suffering after a fatal injury are readily distinguishable, and have been distinguished in our decisions."

In *The Corsair,* 145 U. S. 335, the court held an averment that from the time the tug struck the bank of the river to the time she sunk (about ten minutes) and the said Ella Barton was drowned, she, said Ella Barton, suffered great mental and physical pains and

shock, and endured the tortures and agonies of death, was not a sufficient averment that her "pains and sufferings were not substantially contemporaneous with her death and inseparable as matter of law from it. * * * Had she suffered bodily wounds and bruises, from the result of which she lingered and ultimately died, it is possible that her sufferings during her illness would give a separate cause of action; but the very fact that she died by drowning indicates that her sufferings must have been brief, and, in law, a mere incident to her death. Her fright for a few minutes is too unsubstantial a basis for a separate estimation of damages."

In the present case *Mr. Speer,* the conductor, who was probably the first man to get to decedent after he was hurt, testifies that he called him several times; that he heard him groan; that he was alive; that it was fifteen minutes after he heard him holla before they got him out. He further testified that *Craft was unconscious;* that he heard him give a low mournful groan a few times.

Mr. Pyles testified that he could hear him groaning while under the car; does not know how many times he heard him groan; the last time he groaned was when they were taking him out from under the car; thinks he lived longer than that. Witness does not say whether he was conscious or not.

Mr. Hawkins, the engineer, testifies that he found deceased lying on his face across the rail with his feet on the outside of the rail, his body on the inside; that he was not making any expressions; could hear him breathing; when witness took hold of him he would raise his arm, would pull his arm loose; could hear him breathing and groaning just a little.

Mr. Tanner got to him very soon after the injury; heard him groan once or twice; could see his muscles move; tried to speak to him; couldn't say what was the expression on his face; does not know whether he was still alive when we got to the office, though he could tell he was still breathing; that the car wheel ran over his body; doesn't know whether it cut his body clear in two or not; could tell it broke bones; his legs were limber.

On being recalled, the witness swore that *Craft did not seem to be conscious when he reached him.*

Doctor McNeil said that the car ran across and crushed the lower part of his abdomen.

No witness testified when he died. There was testimony that he was breathing when placed in the ambulance; that he groaned feebly several times. No witness testified that he was conscious. It is not a reasonable inference that he was conscious, since the car wheel had passed over his body, crushing the lower part of his abdomen. The burden of showing affirma-

tively that he was conscious was on the plaintiff, and this burden is not met by the proof.

"If plaintiff seeks to recover more than nominal damages, he must show that the deceased, as a result of the injury, underwent conscious pain and suffering." *St. Louis, I. M. & S. Ry. Co.* v. *Dawson,* 68 Ark. 1.

Mere conjecture can not supply the necessity of this proof. The low groans and muscular movements observed by the witnesses were, as held in *The Corsair* case, mere incidents to the death. They were doubtless "due to muscular relaxation and contraction," as held in *Burch* v. *St. Louis, I. M. & S. Ry. Co.,* 108 Ark. 396. The witnesses in the latter case testified to injuries very similar to Craft's. After witnesses got to him, Birch kind o' raised his head and gasped. One witness said: "He was drawing his eyes and kind o' working his head, and the way he was working his mouth I just put it up he was trying to say something."

In the *Burch* case the Supreme Court of Arkansas used the following language:

"We are of the opinion, however, that the undisputed testimony shows that the death of the deceased was instantaneous and painless. He was virtually cut in two above the hips by the wheels of the tender and engine passing over him and only moved his head slightly and gasped after it passed over him. The physicians testified that these movements were due to mus-

cular relaxation and contraction and the shock was complete and death painless. Such being the case, there can be no recovery for pain and suffering for the benefit of the estate and the court did not err in directing the verdict."

In its opinion in this case the Supreme Court of Arkansas, in disposing of this contention, used the following language:

"It is, however, earnestly insisted by counsel for defendant that there is no evidence which would warrant a verdict against it for pain and suffering. We do not agree with them in that contention. The deceased was run over in the night time, by a coal car of the defendant, and was found lying face downward between the rails. The car at the time it struck decedent was only going at a moderate rate of speed and did not entirely pass over his body. Other employees of defendant heard him halloo when the car struck him and immediately went to where he was. The car had pinched his body down between the rails and it was first necessary to raise it off his body. Decedent could not even then be removed from under the car until it had been pushed forward several feet. All this required about fifteen minutes' time and fifteen minutes more elapsed before the ambulance arrived and decedent was then sent to the hospital. At what time he died is not certain, but it is certain that he was alive when they started to the hospital and that this was a

period of thirty minutes after he had been struck by the car. His body was badly mangled and his intestines lacerated and very much swollen. All the witnesses say that he was groaning during all the time they were trying to remove his body from under the car and until he was carried away in the ambulance. One of the witnesses stated that when he took hold of the decedent and tried to remove him from under the car the decedent would move his arms and also tried to move his body. His companions spoke to him but he did not answer them.

"Under the circumstances we are of the opinion that the jury were warranted in finding that the decedent suffered conscious pain. It is true, he never spoke to his companions, but it must be remembered that while he was under the car and during the time that they were trying to speak to him he was lying face downward, one wheel of the car resting on his body. One of his companions tried to raise him up, and he moved his arm and tried to move his body. We think the jury were warranted in inferring from these facts that he was conscious and was doing all in his power to assist his companions in getting him out from under the car."

The testimony that he groaned, moved his arm, and tried to move his body, merely shows muscular movements. None of the witnesses testified that he was conscious at the time. Two of the car wheels ran over

and rested upon his body. The coroner testified that there were two openings in the lower part of his abdomen, as if some heavy pressure had borne upon it. Death must have been practically instantaneous, even though muscular movements were noticed for several minutes. There is an utter failure to prove conscious suffering.

3. THE VERDICT IS EXCESSIVE.

While the courts can not prescribe a scale of prices for suffering undergone, there must be some proportion between the amount and length of suffering and the jury's award. It is true also that each case must be decided on its own merits, but we submit that an award of $5,000 for a few moments' conscious suffering, which is the utmost that the evidence tends to prove (if indeed it can be held to prove conscious suffering at all), is utterly disproportionate.

In *St. Louis, I. M. & S. Ry. Co.* v. *Stamps*, 84 Ark. 241, deceased was struck on the hips by a train on a bridge, was thrown upon an iron girder parallel with the bridge with force enough to cause him to fall into the river wherein he was drowned. There were indications of bruises on his head. *Held* that a verdict of $500 for pain and suffering was not excessive.

In *St. Louis, I. M. & S. Ry. Co.* v. *Pate*, 90 Ark. 136, evidence that deceased was conscious thirty or forty minutes after he was injured, during which time his pain was intensely excruciating and his injuries

shocking, was sufficient to sustain an award of $1,000 to his estate. To same effect, see *St. Louis, I. M. & S. Ry. Co.* v. *Scott*, 102 Ark. 417.

In *St. Louis, I. M. & S. Ry. Co.* v. *Robertson*, 103 Ark. 361, a case similar to the Stamps case, the jury awarded $1,000 for conscious suffering of two or three minutes. The court said: "*While one thousand dollars would seem to be the utmost limit for pain and suffering for so short an interval*, yet we are not able to see that the verdict for that sum is excessive."

In *Chicago, R. I. & P. Ry. Co.* v. *White*, 165 S. W. 627, a boy was run over near the center of the body. The doctors gave it as their opinion that he suffered from two to ten minutes. The court upheld a verdict of $1,000 for pain and suffering, upon the authority of the Stamps and Robertson cases.

In *The Robert Graham Dun*, 70 Fed. 270, an award of $3,500, in the case of a number of seamen drowned by the sinking of the vessel, after remaining in the water an hour, was reduced to $350 each.

In this case there is no proof of consciousness for any period of time. No reason appears why the award of $11,000 should not be set aside as excessive.

In view of the foregoing authorities, we contend that plaintiff is precluded from seeking to recover for his decedent's pain and suffering, and also that the

evidence fails to establish conscious pain and suffering. We therefore ask that this cause be reversed and dismissed.

EDWARD J. WHITE,

E. B. KINSWORTHY,

TROY PACE,

For Plaintiff in Error.

Office Supreme Court, U. S.
FILED
MAY 10 1915
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 776.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. T. CRAFT, ADMINISTRATOR OF THE ESTATE OF TOM CRAFT, DECEASED, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

JACKSON H. RALSTON,
WILLIAM E. RICHARDSON,
GUSTAVE JONES,
LON L. CAMPBELL,
Attorneys for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 776.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. T. CRAFT, ADMINISTRATOR OF THE ESTATE OF TOM CRAFT, DECEASED, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

This case is brought by writ of error to the Supreme Court of the State of Arkansas to review the decision of that court rendered December 4, 1914, affirming a judgment of the Circuit Court of Jackson County, Arkansas, in an action of damages by the defendant in error for the injury and death of plaintiff's decedent. The action was brought under the Federal Employers' Liability Act of April 22, 1908, as amended by the act of April 5, 1910.

The complaint (Record, p. 1) and amended complaint (Record, p. 9), after describing the circumstances whereby

the decedent was run over by a car of the defendant company and thereafter in about three hours died, continued:

> "That the said deceased was a young man of twenty-three years of age and unmarried, and left him surviving his father, J. T. Craft, who is fifty-three years of age, and who is dependent upon said deceased for support; that said deceased was of good habits, sober and industrious, and at the time of his death was earning on an average of one hundred dollars per month; that he was in line of promotion, and advancement, and would, had not death preceded, within a short time, have been advanced and promoted and his salary increased to two hundred dollars per month. That during the life of said deceased he contributed from one-half to two-thirds of his income to his father, and rendered many great and valuable services in that he nursed and cared for his father during his sickness, administered to his wants and looked after his care and comfort. That said father is in poor health and had said deceased lived, said father would have received during the remainder of his life, from one-half to two-thirds of the income of said deceased, as well as the benefits of personal services rendered by said deceased in nursing, caring for and looking after the comforts of the said father. Plaintiff says that by the injuries inflicted said deceased suffered great physical pain and mental anguish and the agonies of death for a period of over three hours, by reason of all of which plaintiff claims damages in the sum of $30,000."
>
> "Wherefore, premises considered, plaintiff prays judgment against said defendant company for the benefit of J. T. Craft, father of said deceased and the next of kin in the sum of $30,000 cost and all proper relief."

After a trial, the jury returned a verdict for the plaintiff (Record, p. 17) in the following words:

> "We, the jury find for the plaintiff in the sum of eleven thousand dollars as damages for the pain and

> suffering of deceased, and one thousand dollars as damages for contributions to J. T. Craft as father of the deceased."

The trial court, after overruling the motion for new trial, entered a judgment (Record, p. 18), which is in the following words:

> "It is therefore considered, ordered, and adjudged by the court, that the plaintiff, J. T. Craft, as administrator of estate of Tom Craft, deceased, do have and recover of and from the defendant, St. Louis, Iron Mountain & Southern Railway Company, the sum of one thousand dollars as pecuniary loss and the sum of eleven thousand dollars on account of pain and suffering aggregating the sum of twelve thousand dollars, together with all his costs herein laid, paid out, and expended, for which execution may issue, to which judgment defendant excepts."

From this judgment, the defendant company appealed.

It does not appear that in the trial court any question was raised of the propriety of maintaining the suit for both elements of the recovery claimed in the complaint, to wit, for the pain and suffering of the decedent or the loss sustained by the next of kin by reason of the death of the decedent. An examination of the pleadings does not disclose that any objection was made. The objections taken during trial do not question the recovery for these two elements, nor do the instructions requested by defendant (Record, pp. 124-128) or the motion for new trial (Record, p. 129) contain any such suggestion. In fact, the position taken by the defendant company, now plaintiff in error, during the trial, was evidently inconsistent with their present attitude, as is evidenced by No. 8 of their requested instructions (Record, p. 125), which is as follows:

> "Any testimony that has been offered by the plaintiff as to pain and suffering upon the part of the deceased should be disregarded by you unless you be-

lieve from a preponderance of the evidence that the deceased was engaged in interstate commerce in his employment."

The foregoing statement contains, we believe, all of the facts essential to a decision of plaintiff in error's first assignment.

The second assignment raises a question of the sufficiency of the evidence to warrant a verdict for pain and suffering, and the third insists that the judgment of $5,000, which is the amount of this part of the judgment was remitted under the decision of the Supreme Court of Arkansas, is excessive.

The facts disclosed by the evidence are that the decedent, while in the freight yards of the defendant company at night was struck and run over about the hips by a slowly moving detached car. A fellow employee called to the decedent to look out for the car, and just an instant later heard "him holler" and went to where he was, finding that the car had run over him (Record, p. 20). The position of the decedent was such that it was necessary to move the car before he could be taken from under it, and this took about fifteen minutes during which time the witnesses testified decedent was alive (Record, p. 26).

Another witness (Record, p. 37) who was present about five minutes after the accident occurred, testified that it appears that the plaintiff's face was pressed to the road bed of the track by a brake rod which had to be unscrewed and removed from his neck before he could be taken out (Record, p. 47). The witness who helped remove this decedent testifies (Record, p. 47): "When I took hold of him to try to pull him out, decedent would pull his arm loose and try to push himself."

The testimony also shows that the decedent was removed to the railroad office on a stretcher and about fifteen minutes later was carried away in an ambulance and the evidence shows conclusively that he did not die until some time later.

The trial court held that whether the deceased was conscious was a matter for the jury to determine from the evidence, which resulted in the verdict as set out above.

Upon reviewing the testimony, the Supreme Court of Arkansas, says:

> "He lived for something over thirty minutes and suffered great agony."

First Assignment of Error.

> "That under the Federal Employers' Liability Act of 1908, as amended on April 5, 1910, the plaintiff was permitted to recover both for pecuniary loss and the next of kin for his pain and suffering endured by the decedent."

Before discussing the point of law raised by the defendant, we desire to direct the attention of the court to the peculiar condition presented by the manner in which this question is now raised by the plaintiff in error. The original judgment was for an aggregate sum of twelve thousand dollars, but on its face shows that it was made up of two elements of damages, one thousand dollars for the loss of services and contributions by the death of the decedent and eleven thousand dollars for the pain and suffering endured by the decedent. In the appeal to the Supreme Court of Arkansas and to this court plaintiff in error only attaches the allowance for pain and suffering, *i. e.*, it selects the larger of the two elements of recovery. By this means, the plaintiff in error seeks, in the event that this court were to sustain its contention that the judgment constitutes two recoveries for the same injury, to make its own election as to which recovery should be permitted to stand.

If the judgment were erroneous in that it constitutes two recoveries for the same injury, the policy of the law would certainly be to permit the plaintiff to elect which part of the judgment he desired to retain, and he would un-

doubtedly elect to retain the recovery for pain and suffering, so that in fact the amount involved in this appeal is not the sum of $5,000, but the sum of $1,000 only.

Construction of Amendment of April 5, 1910.

In order to understand the purpose and effect of the amendment made to the act of April 22, 1908, by the addition of section 9 by the amendatory act of April 5, 1910, the court will look to the circumstances which occasioned this amendment.

Prior to the original act, the laws of practically every State gave a right of action similar to that afforded by Lord Campbell's act for negligence causing death, the measure of recovery being, of course, the loss to the next of kin resulting from death. A number of the States, in addition to this right of action, provided for the survival of the right of action which the injured person had prior to his decease for pain, suffering, medical attention and other expenses occasioned by the injury.

The act of April 22, 1908, provided for the recovery by the injured employee, and that in the event of the death of such employee his personal representative, on behalf of certain next of kin, might recover for his death. In the case of Fulgam *vs.* Midland Valley R. R. Co., 167 Fed. Rep., 660, Judge Rogers, held:

> "It is clear that the act of April 22, 1908, *supra*, superseded and took the place of all State statutes regulating relations of employers and employees engaged in interstate commerce by railroads. It covered not only injuries sustained by employees engaged in that commerce resulting from the negligence of the master and his servants. * * * It covers and overlaps the whole State legislation and is therefore exclusive."

Thereafter, in the case of Walsh, administratrix, *vs.* N. Y., N. H. & H. R. R. Co., 173 Fed., 494, Judge Lowell

considered a demurrer to a declaration in an action similar to the case at bar, two of the four counts claiming damages for the pain and suffering of the deceased prior to his death. It was sought to sustain these counts because of the prior State statute which extended the right of recovery to the personal representative for pain and suffering of the deceased. The opinion states in part:

> "As the cause of action is given by Federal statute, this court cannot have recourse to a State statute in order to determine whether the cause of action survives or not. * * * There is no general Federal statute and the statute in question, the act of 1908, says nothing about survival.
>
> "Thus remitted to the common law, at which survival is out of the question, we must hold here that the cause of action did not survive, so that counts 1 and 4 are demurrable (Fulgam *vs.* Midland Valley Co., 167 Fed., 660). The court is justified in saying that this result has been reached with reluctance. The maxim *'Actio personalis moritur cum persona'* has not always commended itself (Pollock on Torts, Webb's ed., p. 71). The survival of the cause of action in this case is allowed by the statutes of many States. That one who has suffered in body and in purse by the fault of another, and so has a cause of action against the wrongdoer, should, as to his own estate, be deprived of this remedy by the delays of the law, or without such delay, by his death, before or after action brought, whether connected or unconnected with his first injury, seems to me, as to Sir Frederick Pollock, a barbarous rule. The intent or the oversight of the legislature has established the rule in this case."

In the report upon the bill which was enacted as the amendment of April 5, 1910, the purpose of Congress in making this amendment is clearly and convincingly stated (Senate Report 432, 61st Congress, 2d Session). Referring to the passage of the original act of April 22, 1908, the report states:

> "It is manifest from a consideration of reports, both of the Senate and House Committees, when the measure was pending before those bodies prior to its enactment, that the purpose of the statute was to extend and enlarge the remedy provided by law to employees engaged in interstate commerce in cases of death or injury to such employees while engaged in such service. No purpose or intent on the part of Congress can be found to limit or to take away from such an employee any right theretofore existing by which such employees were entitled to a more extended remedy than that conferred upon them by the act.
>
> "The effect of decisions of cases so far adjudicated under the act has been in general to recognize the true intent of Congress and to extend and make more ample the right to recover damages for death or injury to interstate servants, yet in some particulars its operation has been to limit a recovery which otherwise would have been open to the employee or his representative."

Then after referring to the Fulgam and Walsh cases, *supra,* as illustrative of the fact that under the decision, the effect of the act of April 22, 1908, had been in part to deprive employees and their representatives of pre-existing remedies, the report concludes:

> "The language of the statute should be made clear so that the uncertainty and obscurity suggested by Judge Lowell would be removed. So important a statute should be made so certain in its terms that the intent of Congress may be made manifest and clear. It certainly should be as broad, comprehensive, and as inclusive in its terms as any of the similar remedial statutes existing in any of the States which are suspended in their operation by the force of the Federal legislation upon the subject."

During the debate upon the passage of the amendment of April 5, 1910, the purpose of Congress to add to the right of the personal representative to recover for the death of

the deceased the further right to recover for the pain and suffering, expenses and so forth, as to which a right of action existed in the deceased at the time of his death as an asset of his estate, was manifest, at page 4093 of volume 45, Congressional Record for April 1, 1910, Senator Brown made the following statement:

> "So far as the recovery for death is concerned, the right of the survival is contained in the present law. The decision (of Judge Lowell) only went so far as the cause of action might arise to reimburse the damage done the estate."

And Senator Hale said (4094):

> "I want the Senate to say whether it purposes that this fund, this property derived from this action, surviving not only for death but for damages, shall be followed out and distributed as the Federal statute, or whether we shall leave all that to the State legislatures."

And Senator Borah said (p. 4099):

> "My colleage will understand that there never has been any question about the survival of the action except the action for injury to the estate of the deceased."

It will be readily seen that the rational construction of the amendment is against the contention of the plaintiff in error. The right to recover the loss sustained by the next of kin by reason of the death of the deceased is in no degree inconsistent with the recovery for the pain and suffering, medical expenses and other incidental damages suffered by the deceased. Such damages were immediately prior to his death, which may have occurred six months after the accident, an asset which would belong to his estate except for the rule of the common law against the survival of certain classes of actions. One element is in no respect an offset against the other. The action of the defendant has occa-

sioned two distinct injuries and we submit it was the obvious purpose of Congress to permit the personal representative to recover on account of both.

In construing the words "but in such cases there shall be only one recovery for the same injury," it is clear that Congress intended that by the words "the same injury" to refer to the injury described in the second line of the section, and that there was no intention of including the recovery for death given by section 1 of the original act. As the bill was originally reported, the last clause read:

> "But in such cases the recovery shall be limited to compensatory damages and there shall be only one recovery for the same injury."

All that appears to have been contemplated was that in giving a right of action to the personal representative to recover for a specific thing, the defendant railroads should not be required to pay twice for the same thing, and that if the deceased had recovered during his lifetime, no second recovery might be made after his death by his personal representative for the same injury.

The courts have frequently pointed out that the term "injury" designates the result of the wrongful act rather than the act itself. In this case, the negligence of the plaintiff in error occasioned an injury to the deceased, to wit, great physical pain and suffering. It also occasioned a specific injury to the dependent father of the deceased, to wit, the loss of services and contribution. Some of the definitions of the term "injury" are as follows:

> "Injury is damage resulting from an unlawful act." Thornton *vs.* Thornton, 63 N. C., 211.
>
> "Injury in its legal sense means damage resulting from a violation of a legal right." Macauley *vs.* Tierney, 19 R. I., 255.
>
> "As used in actions where error in a trial is presumed to be to the injury of a party the word 'injury' means effect upon the result and hence error

without injury is not reversible." State *vs.* Reddington, 7 S. D., 368.

"Injury in its legal sense means damage resulting from an unlawful act." Bohn Manufacturing Co. *vs.* Hollis, 54 Minn., 223; State *vs.* Moore, 69 N. H., 99.

If, as would seem to be the case, the word "injury" was used in this sense by Congress in the act of April 5, 1910, the language of the amendment is thoroughly reconciled to the obvious purpose and natural construction of the statute.

In the case of Northern Pacific Railroad *vs.* Maerkl, 198 Fed. Rep., 1, the court adopts our construction of this provision, holding directly that the amendment permits one recovery upon these two combined causes of action:

> "So that recovery may now be had for the injury and suffering sustained by the deceased as well as the pecuniary loss or injuries resulting to the beneficiaries because of his death."

We also invite the attention of the court to the following cases: Cain *vs.* Southern Railway, 190 Fed., 211; St. Louis, Iron Mountain and Southern Railway *vs.* Hesterley, 228 U. S., 702; St. Louis and San Francisco Railroad Company *vs.* Conarty, 106 Ark., 421; Kansas City Southern Railway Company *vs.* Leslie, 167 S. W., 83.

Second and Third Assignments of Error.

These two assignments of error involve purely questions of fact. The State court specifically decided that the deceased was conscious of great agony for a period of thirty minutes, and it is difficult for us to understand upon what basis the plaintiff in error predicates the right of this court to review. Unlike appeals in writs of error to the Federal courts, the decisions of this court have been uniform that on

writ of error to the highest court of a State, the findings of fact of the State court are accepted as conclusive.

Hedrick *vs.* Atchison, etc., R. Co., 167 U. S., 673.
Keokuk, etc., Bridge Co. *vs.* Ill., 175 U. S., 626.
Jenkins *vs.* Neff, 186 U. S., 230.
Garnder *vs.* Bonesteel, 180 U. S., 362.
Chrisman *vs.* Miller, 197 U. S., 313.
Chapman, etc., Land Co. *vs.* Biglow, 206 U. S., 41.
Clipper Mining Co. *vs.* Eli M. & L. Co., 194 U. S., 220.
Thayer *vs.* Spratt, 189 U. S., 346.
Quimby *vs.* Boyd, 128 U. S., 488.

Moreover, it is held that the verdict of a jury settles all questions of fact on a writ of error from this court to a State court. Smiley *vs.* Kansas, 196 U. S., 447; Shauer *vs.* Alterton, 151 U. S., 607.

This rule also applies to the question whether the evidence was sufficient to be submitted to the jury for decision. Noble *vs.* Mitchell, 164 U. S., 367.

It is also to be noted that the questions raised by assignments numbered two and three would not be subject to consideration except in the event that the court decided against the plaintiff in error in respect to assignment No. 1 which alone presents a Federal question, and, therefore, they will not be considered by this court. Swope *vs.* Leffingwell, 105 U. S., 3; Chicago Life Insurance Company *vs.* Needles, 113 U. S., 574.

Respectfully submitted,

JACKSON H. RALSTON,
WILLIAM E. RICHARDSON,
GUSTAVE JONES,
LON L. CAMPBELL,
Attorneys for Defendant in Error.